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No. 87-.....

Supreme Court, U.S.
FILED

SEP 19 1987

JOSEPH F. SPANOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1987

JOHN T. WILLIAMS; MCA INC.; UNIVERSAL CITY
STUDIOS, INC.; MUSIC CORPORATION OF AMER-
ICA, INC.; MCA RECORDS, INC.; and MERCHAN-
DISING CORPORATION OF AMERICA, INC.,

Petitioners,

vs.

LESLIE T. BAXTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RONALD S. ROSEN
(Counsel of Record)
MARSHA E. DURKO
SILVERBERG, ROSEN, LEON
& BEHR
2029 Century Park East
Suite 1900
Los Angeles, CA 90067-3274
(213) 277-4500

*Attorneys for Petitioner
John T. Williams*

LOUIS P. PETRICH
(Counsel of Record)
EDWARD A. RUTTENBERG
LEOPOLD, PETRICH & SMITH
A Professional Corporation
2049 Century Park East
Suite 3110
Los Angeles, CA 90067-3274
(213) 277-3333

*Attorneys for Petitioners
MCA Inc., Universal City
Studios, Music Corporation
of America Inc.,
MCA Records, Inc.,
Merchandising Corporation
of America, Inc.*

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QUESTIONS PRESENTED

The Copyright Clause of the Constitution, the Copyright Act of 1976, and the First Amendment mandate the "idea/expression dichotomy," which ensures that only an author's expression, and not the underlying ideas or facts contained in his work, may be protected under the copyright laws. The questions presented by this case are:

1. Whether the court of appeals may adopt a rule for determination of infringement that discards the idea/expression dichotomy by failing to distinguish ideas from expression and by empowering a trier of fact to find infringement uncontrolled by any principled standard?

2. Whether the court of appeals may adopt a rule for determination of infringement that permits the trier of fact to impose liability based on the amount of a defendant's alleged use without regard to whether the matter used is protectible and material?

3. Having adopted a standard to determine infringement that does not properly focus on the idea/expression dichotomy or the materiality of the claimed use, may a federal court, on the ground that no "bright line" exists to define when substantial amounts of protectible expression have been taken, abdicate its duty to set the parameters within which a trier may find infringement?

4. Whether on a motion for summary judgment under Rule 56, the burden shifts to the moving party defendant to make a "bright line" showing that no substantial protectible expression of plaintiff's work has been taken?

LIST OF PARTIES

The parties to the proceedings below are Leslie T. Baxter, plaintiff-appellant below, respondent herein, and John T. Williams and MCA Inc., and its subsidiaries, Universal City Studios, Inc., Music Corporation of America, Inc., MCA Records, Inc. and Merchandising Corporation of America, Inc., defendants-appellees below, petitioners herein.

Petitioners MCA Inc., and/or Universal City Studios, Inc., Music Corporation of America, Inc., MCA Records, Inc. and Merchandising Corporation of America, Inc. have the following partially owned subsidiaries and/or affiliates (referred to by Rule 28.1): Cinema International Corporation N.V.; Cineplex Odeon Corporation; Mood Music Company, Inc.; Overland Stage, Inc.; Quantum Media, Inc.; Supreme Music Corporation; Town Cinema Investments Pty. Ltd.; Western Costume Co.

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JOHN T. WILLIAMS, *et al.*,

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vs.

LESLIE T. BAXTER,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioners John T. Williams, MCA Inc., Universal City Studios, Inc., Music Corporation of America, Inc., MCA Records, Inc., and Merchandising Corporation of America, Inc. (defendants below) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on June 23, 1987.

OPINIONS BELOW

The initial March 5, 1987 Opinion of the court of appeals ("the Initial Opinion") is reprinted in the separate appendix to this petition, at App. 13 to 25; the court of ap-

peals' May 11, 1987 Order and Amended Opinion ("the Amended Opinion") is reported at 812 F.2d 421; it is reprinted in the appendix at App. 1 to 12. The Opinion of the district court was unreported; it is reprinted in the appendix at App. 26 to 27.

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JURISDICTION

The Amended Opinion was entered on May 11, 1987. A timely petition for rehearing and rehearing *en banc* (App. 29-47) was denied on June 23, 1987, and this petition for certiorari was filed within ninety (90) days of that date. The order denying rehearing is reprinted in the appendix at App. 28.

The jurisdiction of this Court is invoked under 28 U.S.C. § 2101(c).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent portions of Article I, section 8 of the Constitution, the First Amendment, section 102(a) & (b) of the 1976 Copyright Act and Rule 56 of the Federal Rules of Civil Procedure are reprinted in the Appendix at App. 48-51.

STATEMENT OF THE CASE

According to plaintiff's complaint, in 1953 plaintiff Baxter created a musical composition entitled "JOY", which was released in 1954 as one of seven selections of a record album entitled "The Passions". Clerk's Record [C.R.] 1. According to Baxter's liner notes, JOY "resembles more than any of the other selections in The Passions a popular recording." C.R. 14, Ruttenberg Decl., Exh. "E".

In about 1982, petitioner John T. Williams¹ composed a musical composition (the "Theme From E.T.") used as the main thematic music for the unprecedentedly successful motion picture, "E.T.: The Extra-Terrestrial" (the "E.T. Movie"). Williams' score received an Academy Award for best original music. The remaining petitioners (collectively "MCA") are alleged to have produced and distributed the E.T. Movie or sound recordings or merchandise using the Theme from E.T.

On November 2, 1983, Baxter filed a complaint for copyright infringement in the district court for the Central District of California. C.R. 1. He alleged that the Theme from E.T. was largely copied from JOY. Jurisdiction in the district court was based on 28 U.S.C. section 1338(a).

1. The works at issue.

Baxter based his claim entirely on a comparison of a 12-note bridging "motif" in JOY with the 8-note main

¹ Mr. Williams is a renowned composer and conductor, presently serving as the conductor of the Boston Pops Orchestra.

melody in the Theme From E.T.² The pitches and rhythm³ of these two segments may be illustrated as follows, with the pitch for each note represented by each letter and the duration of each pitch by the number of times the pitch is denoted between dashes. (Lower case letters represent grace notes.):

JOY: DD-DD-DD-GG-f-g-*F-E-D-E*-CC-AA.

THEME FROM E.T.: CCCC-GGGG-*F-E-D-E*-CCCC-
GGGG.

Only a four-note sequence in each work (italicized above) was identical in pitch and rhythm: *F-E-D-E*.⁴

Baxter used his 12-note sequence as a bridge between the two major melodies in JOY; it appears in eight bars of Baxter's 93-bar song. C.R. 14, Exh. C. Williams elaborately developed his 8-note melodic line throughout the Theme from E.T. C.R. 14, Exh. D.

2. The motion for summary judgment.

On August 21, 1984, MCA moved for summary judgment in which motion Williams joined on August 24, 1984. C.R. 17-18. For sake of argument only defendants assumed that (1) plaintiff owned a duly registered copy-

² The court of appeals misapprehended the limited claim made by Baxter. Note 25, *infra*.

³ A musical note consists of a "pitch" (e.g., A, C, F) and a "duration" (e.g., quarter note, half note).

⁴ Other well-known songs having the same four-note sequence of F-E-D-E are: "The Star Spangled Banner", "O Holy Night", "Three Blind Mice", and "God Save The Queen".

right in JOY, (2) defendants had "access" to JOY (i.e., a reasonable opportunity to view or hear it) before Theme From E.T. was composed,⁵ and (3) the "general ideas"⁶ in the subject songs were substantially similar. C.R. 17, at 10-11 & n. 3. Defendants sought summary judgment on the ground that as a matter of law the two compositions were not substantially similar in their protectible expression. C.R. 17, at 4.

Defendants' motion papers attached (1) cassette tape recordings of the parties' respective works (copies are enclosed in the Appendix to this Petition), (2) the written sheet music for the two works (C.R. 14: Ruttenberg Decl. Exhs. C and D), and (3) Baxter's admissions in discovery

⁵ "Access" is commonly assumed by defendants in a motion to dispose of an infringement claim. *E.g.*, *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir. 1986); *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985). By assuming that whatever similarity exists between the works resulted from copying, the remaining issues are isolated: whether what was taken was protectible and whether enough protectible expression was taken to constitute infringement.

⁶ According to the leading decision in the Ninth Circuit, *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164-65 (9th Cir. 1977), "substantial similarity of expression" is determined by a two-step test that looks first to determine the works' objective similarity as to their "general ideas" (the "extrinsic test") and then to their subjective similarity (the "intrinsic" test). 3 M. Nimmer, *Nimmer On Copyright* § 13.03[E] at 13-56 to -60 (1987) ("*Nimmer*"). Because expert testimony is allowed as to the former but not the latter test, petitioners-defendants assumed *arguendo* similarity of "general ideas" under the extrinsic test to make expert testimony irrelevant on the motion. Nevertheless, Baxter offered expert testimony dissecting the works; this testimony was properly excluded. District Court Order, App. at 27; Amended Opinion, App. at 8 n.2.

that (a) no fewer than six prior classical works of music contain the six-note fragment on which Baxter based his claim and (b) similarities of "pitch" alone, without reference to rhythm, are meaningless.⁷ C.R. 14, Exh. F, pp. 46-56.

3. The decision of the district court.

The district court listened to the cassette tape exhibits and read the submitted materials (R.T. 3) before oral argument on October 15, 1984, at which time it again played the tapes (R.T. 14-15). On October 23, 1984, after taking the motion under submission (C.R. 33), the district court granted defendants' motion and judgment was entered on October 24, 1984. C.R. 34-37.

The district court's Order (C.R. 34; App. at 26) noted that defendants' motion turned on one decisive issue: "whether a reasonable lay jury could find 'substantial similarity' of expression of the ideas—the so-called intrinsic test" in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977) ("*Krofft*"). Applying the test, the district judge noted:

This Court's "ear" is as lay as they come. The Court cannot hear any substantial similarity between defendant's expression of the idea and plaintiff's. Until Professor Bacal's tapes were listened to, the Court could not even tell what the complaint was about.

⁷ Baxter explained his discovery response by pointing out that the first seven pitches of "Rudolph, The Red-Nosed Reindeer" are identical to the beginning of the traditional hymn "Rock Of Ages". C.R. 14, Exh. F, pp. 46-56.

Granted that Professor Bacal's comparison exposes a musical similarity in sequence of notes which would, perhaps, be obvious to experts, the similarity of expression (or impression as a whole) is totally lacking and could not be submitted to a jury.

Order, App. at 26-27.

On November 20, 1984, plaintiff filed a timely Notice of Appeal from the summary judgment. C.R. 38. Jurisdiction of the appeal existed under 28 U.S.C. section 1291.

4. The Initial Opinion of the Court of Appeals.

By its March 5, 1987 Opinion, the court of appeals reversed the summary judgment and remanded for trial, citing factors opposing summary judgment found in *Ander-son v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), decisions in the Ninth Circuit and most notably the discredited "slightest doubt" test of *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947) ("*Arnstein*"), to conclude that summary judgment is disfavored on the substantial similarity issue. App. at 21, 23 & n.3.

Presuming that "summary judgment is disfavored", the court of appeals posed the question whether a six-note sequence of pitches common to each work could constitute "protectible expression," and concluded that the answer depended upon whether the six-note sequence was "qualitatively important". App. at 23-24. According to the court, because "no bright line exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity", "the ear of the court must yield to the ears of jurors." App. at 23-24. As additional support,

it relied on defendant's assumption of access to lower the amount of similarity needed to prove infringement (the so-called "Inverse Ratio Rule"). App. at 17, 23.⁸

Petitioners' timely petition to the court of appeals for a rehearing and a rehearing *en banc* was filed on March 19, 1987. App. 29-47.

5. The Amended Opinion.

The court of appeals' May 11, 1987 Order and Amended Opinion struck from the Initial Opinion some of its references to summary judgment being disfavored, its express reliance upon the Inverse Ratio Rule and specific references to *Arnstein's* application of the "slightest doubt" test for summary judgment. Amended Opinion, App. at 4. On June 23, 1987, the court of appeals denied the petition for rehearing and for rehearing *en banc*. App. at 28.

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REASONS FOR GRANTING THE WRIT

Although the court of appeals' Amended Opinion is a virtually contentless decision, bereft of analysis, it will serve and has already served to signal other panels of the

⁸ This sliding scale formulation, known as the Inverse Ratio Rule, is properly employed only to raise an inference that defendant's work was derived in some respect from plaintiff's work; It does not prove that what was copied was either protectible or material. See note 18, *infra*; Petition for Rehearing, App. at 42 n.18.

Ninth Circuit⁹ and lower courts¹⁰ that summary judgments based on a lack of substantial similarity of protectible expression will be perfunctorily reversed.¹¹

The Ninth Circuit's decision is a retrogressive approach that threatens to create chaos in the courts and in the marketplace. Substantively, by depriving the "substantial similarity" test of any principled content, the decision gives triers of fact carte blanche to ignore the "idea/expression" dichotomy and thus to impose ruinous remedies based solely on derivation.¹² It reasons that because no "bright lines" exist, courts cannot and must not set limits.

While no federal copyright statute has ever defined the nature and scope of copying required to constitute

⁹ In an unpublished Memorandum, App. 55-58, another panel reversed summary judgment for defendants, relying upon the *Baxter* panel's Opinion. *Thompson v. Ritchie*, Nos. 86-6185 and 86-6505 (9th Cir. June 11, 1987). Even though the district court found the musical compositions so dissimilar that it awarded attorney's fees to defendants and the *Thompson* panel thought "the two songs appear to have little similarity", it felt compelled by *Baxter* to reverse because "no bright line" existed and "summary judgment is disfavored." App. at 58.

¹⁰ On June 22, 1987, the district court judge in this case denied a motion for summary judgment in a later action, because the *Baxter* Court of Appeals seemed to him to require jury trials if the issues were "remotely arguable." (App. at 53-54).

¹¹ A prior opinion of Judge Tang announcing that summary judgment on the issue of substantial similarity was disfavored had a similar signalling effect. Note 34, *infra*.

¹² 17 U.S.C. §§ 502-505. The remedy of allocating that portion of defendants' profits attributable to the infringement "may seduce judges into finding infringement in dubious cases by holding out some assurance that the defendant will anyway not be hit too hard." *B. Kaplan, An Unhurried View Of Copyright* (1967), at 71.

infringement, the lower courts, without any guidance from this Court, have fashioned the “substantial similarity” test to accomplish the dual functions of the law—to reward the creator of new works without impeding subsequent authors.¹³ Unfortunately, the rubric “substantial similarity” has been used inconsistently, sometimes to mean simply “derivation”, other times to connote “infringement”. The court of appeals below has transformed “substantial similarity” into a test that equates derivation with infringement, ignoring important constitutional and statutory policies and raising an important issue to be settled.

Procedurally, the court of appeals below has lessened the ability of lower courts to rid themselves and litigants of spurious infringement actions short of expensive trials. Creative works, especially successful ones,¹⁴ attract infringement claims in the proportion that judicial standards encourage them. The increased numbers of copyrighted works increase the likelihood of similarities, and modern communications increase the likelihood of access. Application of the idea/expression dichotomy under the substantial similarity of expression test is the only practical regulator. The Initial Opinion candidly rested on the premise that summary judgments are disfavored and con-

¹³ *Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) (Newman, J.) (“[The copyright law] can deter the creation of new works if authors are fearful that their creations will too readily be found to be substantially similar to preexisting works. The idea-expression dichotomy originated . . . in an effort to enable courts to adjust the tension.”)

¹⁴ This is the sixth infringement suit against the E.T. Movie. All the rest were summarily dismissed, although not without great expense. *E.g.*, *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

trived a "no bright line" rule to revive the Second Circuit's long discredited "slightest doubt" rule. Stripping the substantive law of standards exposes copyright defendants to capricious results and crippling judgments; creating a "no bright line" rule intended to eliminate summary judgment (or directed verdict or JNOV) in copyright cases pressures defendants (frequently themselves copyright holders of works representing investments of creative energy and money vastly greater than plaintiff's) into extortionate settlements. The abdication of judicial supervision does not serve but discourages the investment of time and creative energy and the artistic self-expression encouraged by the Copyright Act and the First Amendment.

I. THE DECISION BELOW CONFLICTS WITH COPYRIGHT LAW AND POLICY, FIRST AMENDMENT INTERESTS, AND OTHER FEDERAL CIRCUIT DECISIONS, AND INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. The Conflict Created By The Decision Below Merits Prompt Resolution By This Court.

1. Neither Congress nor this Court has ever addressed the standard for determining copyright infringement.

The Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, nowhere defines the most critical issue arising under it: infringement. Section 501(a) simply provides that infringement occurs when any of the "exclusive" rights granted under section 106 are "violated" and no defenses exist. 17 U.S.C. §§ 106, 501(a). Prior federal copyright statutes were no more definitive. B. Kaplan, *An Unhurried View of Copyright* (1967) ("Kaplan") at 39-40: "the

[1909] statute, like its predecessors, leaves the development of fundamentals to the judges.”

Nor has this Court ever, since the 1790 Copyright Act, squarely opined what amount of taking constitutes infringement or even *how to analyze the issue*.¹⁵ While this Court rightly would not wish to review decisions that are necessarily *ad hoc*, it has intervened to clarify the proper application of copyright principles where uncertainty has caused over-or under-protection. *E.g.*, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (explaining the proper approach to applying the “fair use” defense, although application necessarily “requires a case-by-case determination”, 471 U.S. at 549, “tailored to the individual case.” 471 U.S. at 552).

So it is here. Like the court of appeals in *Harper*, which threatened to launch a rule of fair use that “gave insufficient deference to the scheme established . . . for fostering . . . original works”, 471 U.S. at 545-46, the court of appeals below has announced a confusing set of rules regarding copyrightability and infringement¹⁶ (in conflict with other circuit courts, notably the Second), which rules eliminate the idea/expression dichotomy in violation of the copyright statute and policy as well as First Amendment principles.

¹⁵ The *prima facie* case is distinguished from the affirmative defense of “fair use”, which excuses what would otherwise constitute infringement. 17 U.S.C. § 107. See *e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 548 (1985) (noting that the Court need not reach the issue raised by non-literal similarity).

¹⁶ “[T]he subjects of copyrightability and infringement . . . are close, almost Siamese, partners.” *Kaplan*, at 38.

2. Copyright policy and First Amendment considerations are at stake.

Early on, our courts concluded that mere *derivation* was not actionable, that copyright policy mandated a rule that “ideas” are not protected by copyright law. *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (“protection is given only to the expression of the idea—not the idea itself”); *Holmes v. Hurst*, 174 U.S. 82, 86 (1899); 1 *Nimmer*, § 1.10. The present section 102(b), 17 U.S.C. § 102(b), restates that the “basic dichotomy between expression and idea remains unchanged.” H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 57 (1976); *Harper*, 471 U.S. at 547 (“no author may copyright facts or ideas. § 102. The copyright is limited to those aspects of the work—termed ‘expression’—that display the stamp of the author’s originality”). Additionally, it is settled that the idea/expression dichotomy “‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communications of facts while protecting an author’s expression.’ ” *Harper*, at 556.¹⁷

B. The Conflict Between The Federal Circuit Courts Regarding The Determination Of Substantial Similarity Has Caused Confusion Materially Affecting The Determination Of The Idea/Expression Dichotomy.

The task of applying one copyright law to various forms of intellectual property is difficult enough; it is considerably burdened by an ambiguous use of several key terms: “Copying” is used variously to connote (1) some derivation or (2) derivation of matter sufficient to con-

¹⁷ First Amendment principles mandate application of this idea/expression dichotomy to all forms of self-expression. 1 *Nimmer*, § 1.10[B]; and see *Zacchini v. Scripps-Howard Bdcstg. Co.*, 433 U.S. 562, 577 n.13 (1977).

stitute infringement. "Substantial similarity" is used variously to refer to: (1) sufficient similarity when coupled with access to raise an inference that defendants' work derived from plaintiff's work to some extent, (2) the claim or finding, where the works are not literally the same, that the expression and not just the ideas or facts in plaintiff's work was copied, or (3) the fact that the expression taken was material enough to constitute infringement.

1. The Second Circuit Approach.

The circuits having the most copyright litigation, the Second and the Ninth, have formulated most of the rules for applying the idea/expression dichotomy. Until 1977, their approaches were the same. The Second Circuit's leading decision, *Arnstein*, and its progeny state the traditional approach. A *prima facie* case of infringement is proved by evidence of (a) plaintiff's ownership of a valid copyright, and (b) unauthorized copying of protected material by defendant, (c) that goes so far as to constitute unlawful appropriation. *W. Patry*, Latman's *The Copyright Law* (6th ed. 1986) at 191 ("Patry").

Copying (i.e. derivation) may be proven either directly or circumstantially by (a) proof of access to plaintiff's work and (b) such similarities¹⁸ that indicate that

¹⁸ "[W]hether similarities are substantial and material enough to constitute unlawful appropriation, i.e., infringement, is entirely different from whether there are similarities sufficient to establish indirect proof of copying. Confusion on this point has occurred due to the unfortunate practice of some courts using the short-hand term 'substantial similarity' to connote both that type of similarity used to establish indirect proof of copying and that necessary to establish a *prima facie* case of infringement." *Patry*, at 193.

defendants' work derived from plaintiff's work. *Patry*, at 191; *Arnstein*, 154 F.2d at 468. Dissection of the works and expert testimony are permitted at this stage. *Ibid.*

Once access and derivation-indicating similarities have raised an inference of copying, plaintiff must show (1) that the allegedly infringed matter is protected by copyright¹⁹ and (2) that the taking of expression is substantial and material enough (qualitatively or quantitatively)²⁰ to constitute an unlawful appropriation²¹. Dissection and expert testimony are forbidden at this second stage. *Ibid.*

To determine "unlawful appropriation," *Arnstein* proposed an "audience" test:

The proper criterion on that issue is not an analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians. The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts. The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.

154 F.2d at 473.

¹⁹ *Harper*, 471 U.S. at 548.

²⁰ *Patry*, at 196; 3 *Nimmer* § 13.03[A] at 13-39 to -40.

²¹ *Arnstein v. Porter*, 154 F.2d at 468.

Although determination of the unlawful appropriation issue under *Arnstein's* second stage would logically require that uncopyrightable ideas or facts or unoriginal matter be excised (*i.e.*, eliminated from consideration) from any comparison, this statement of the audience test assumes that everything copied by defendant is protectible and only focuses upon whether sufficient and material amounts were taken. It does not explain how the trier should apply the audience test where the portion of plaintiff's work that is pleasing to the audience is unprotectible because it is not original or is merely an idea or a fact. Later Second Circuit decisions have read into this test a duty to excise such unprotectible portions of plaintiff's work: *Walker*, 784 F.2d at 48 (excising facts and ideas in comparing two fictional works); *Warner Bros., Inc. v. American Broadcasting Cos., Inc.*, 720 F.2d 231, 242 (2d Cir. 1983) (excising ideas and concepts in comparing two fictional characters); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978-80 (2d Cir.) *cert. denied*, 449 U.S. 84 (1980) (excising ideas, an interpretation of an historical event, specific facts and *scenes a faire* in comparing a factual book and a fictional movie).

2. The Ninth Circuit Approach

The Ninth Circuit in *Krofft* departed from *Arnstein*. Disavowing the copying/unlawful appropriation two-step test of *Arnstein*, *Krofft* announced a new bifurcated extrinsic/intrinsic test purportedly based on the idea/expression dichotomy, 562 F.2d at 1164,²² which test is now

²² *Krofft* was misled into this bifurcated test by ambiguous statements that copyright infringement was proven by (a) plaintiff's ownership of a copyright and (b) copying by defendant: "under such statements, infringement would be established by proof of ownership, access, and substantial

mandatory in the Ninth Circuit. *Kamar Intern. Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062-63 (9th Cir. 1981).

Under *Krofft*, the trier would first (under the "extrinsic" test) determine whether the works are substantially similar as to their "general ideas"²³ and, if so, would next (under the "intrinsic" test) determine whether the works are substantially similar as to their *expression*. The trier of fact must apply the second test unaided by expert testimony or any analytic dissection. To aid in applying this *intrinsic* test, *Krofft* expressly adopted *Arnstein's* audience test. 562 F.2d at 1165. But *Krofft* (unlike the recent Second Circuit cases) made no provision to prevent the trier from protecting ideas or other unprotectible portions of plaintiff's work in applying the audience test, *i.e.* by requiring the trier to excise unprotectible matter from its comparison.

Ninth Circuit panels have reacted to the 1977 *Krofft* decision in various ways, without questioning its essential illogic. Several panels comparing dramatic works, appar-

(Continued from previous page)

similarity." *Krofft*, 562 F.2d at 1162. The *Krofft* court worried that this formulation raised the possibility that access and substantial similarity of *ideas* rather than *expression* might be treated as infringement. *Krofft* simply misread *Arnstein*. *Arnstein* never used the phrase "substantial similarity" referring to the copying issue; *Arnstein* thought the question was whether "the similarities are sufficient to prove copying". See note 18 *supra*. *Krofft* was thus confused by *Arnstein's* comments about "permissible" copying, *i.e.*, "copying which is not illicit." 154 F.2d at 472. All that was meant was that similarities as to ideas or other unprotectible material might suffice to prove *derivation* or *copying* but not that what was taken was *expression*. *Patry*, at 192-196 & n.29. *Krofft* drew the erroneous conclusion that substantial similarity of ideas was a necessary precondition of infringement.

²³ This test is, of course, pointless, as ideas are not protectible.

ently at a loss how to excise unprotectible matter (or how to apply the idea/expression dichotomy) in the *intrinsic* test, have instead excised those matters under the *extrinsic* test, although the presence of expression is theoretically irrelevant to the similarity of "general ideas". *E.g.*, *Berkic v. Crichton*, 761 F.2d at 1293 (9th Cir. 1985) (opinion by Sneed, J. who participated in *Krofft*); *Litchfield v. Spielberg*, 736 F.2d at 1356 (9th Cir. 1984). A recent decision states that unprotectible matter must be excised in applying the *intrinsic* test, but fails to explain how that is consistent with the audience test. *Worth v. Selchow & Richter Co.*, No. 86-5909 (9th Cir., Sept. 8, 1987). Other panels have excised ideas and *scenes a faire* without indicating whether excision was under the extrinsic or intrinsic test. *Frybarger v. International Business Machines Corp.*, 812 F.2d 525, 529-30 (9th Cir. 1987); *See v. Durang*, 711 F.2d 141, 143-44 (9th Cir. 1983); *Jason v. Fonda*, 698 F.2d 966 (9th Cir. 1982), incorporating by reference *Jason v. Fonda*, 526 F.2d 774, 777 (C.D. Calif. 1981).

Still other panels have excised facts and ideas without discussion of the bifurcated test or the audience test. *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir. 1984). Yet another panel has held that it is immaterial that a reasonable observer would find two works "virtually indistinguishable"; what matters is whether "the very small amount of protectible expression [in plaintiff's work] is substantially similar to the equivalent portions of [defendant's work]." *Cooling Systems & Flexibles v. Stuart Radiator*, 777 F.2d 485, 493 (9th Cir. (1985) (Sneed, J.). Still another held it was not necessary under Ninth Circuit standards either to determine the scope of plaintiff's copyright protection or to excise pro-

protectible matter. *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 319, 321 (9th Cir. 1987).

Thus, ten years of interpreting *Krofft* has only compounded the confusion of Ninth Circuit courts. *Krofft* has percolated long enough.

In light of the *Krofft* legacy, it is not surprising that the court of appeals below analyzed copyrightability and substantial similarity in a way that would allow triers to protect ideas or the *de minimis* use of expression.

C. The Court Below Applied The Substantial Similarity Tests in a Manner That Conflicts With Other Federal Appeals Courts and The Idea/Expression Dichotomy.

Defendants simplified the courts' task below by assuming *arguendo* that (1) plaintiff owned the copyright in JOY, (2) defendants had access to JOY and (3) any similarities resulted from copying by defendants (thus conceding derivation). All that remained for decision was application of the "intrinsic" test under *Krofft*: whether defendants took *protectible expression*²⁴ and in *sufficient amounts* (qualitatively or quantitatively) to constitute infringement.

1. Whether Expression Was Arguably Involved.

The Amended Opinion either never analyzed whether the arguable similarities involved protectible expression

²⁴ Defendants also conceded substantial similarity of "general ideas" (the extrinsic test) because the test performs no function where copying is conceded, note 23 *supra*, and has no impact on the question whether the works are substantially similar in their *protectible expression*. Under *Krofft*, both the extrinsic and intrinsic tests must be satisfied to show infringement. *Krofft*, 562 F.2d at 1164.

or stated a rule for determination that is entirely without any limiting principle.

Two types of similarity of expression were discussed in the Amended Opinion: the use of 4 or 6 note fragments and the alleged use of the work as a whole. Plaintiff claimed that the 12-note "motif" in his JOY was infringed by literal similarities ("fragmented literal similarity", 3 *Nimmer*, § 13.03[A][2]) in the 8-note main theme in E.T. As shown above, the two works share a six-note²⁵ sequence of *pitch*s: G-F-E-D-E-C.²⁶ But pitch similarity alone does not establish copyrightability. "Similarity of tone succession" is "inevitable in all musical compositions." *Hirsch v. Paramount Pictures*, 17 F.Supp. 816, 817 (S.D. Calif. 1937) (Yankwich, J.). All music in Western society is limited to 12 pitches, reduced to 7-note major or minor scales, and reduced further still by the limited number combinations that are pleasing to the ear. *Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 82 (2d Cir.

²⁵ If the court of appeals had properly considered defendants' contentions that only four successive notes in each work were common in *pitch and rhythm*, it would have had to deal with precedent directly on point:

The copyrightability of [the song] 'Bubbles' is *not* the four-note sequence, but the fitting together of this sequence with other melodious phrases into a unique composition.

Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 721 (9th Cir. 1976) (emphasis added).

²⁶ The court of appeals misstated that *defendants* argued that a six-note sequence was at stake. (App. at 10, ¶ 6). In fact, this was plaintiff's claim. *Baxter Op. Br.* 15, 23-24, Reply Br. 14-25; defendants argued that only four notes shared common pitch and rhythm, which plaintiff admitted. Note 4 *supra* and accompanying text.

1940).²⁷ Copyright protection for music usually involves at least pitch, rhythm and harmony. See, e.g., *Northern Music Corp. v. King Record Distributing Co.*, 105 F.Supp. 393 (S.D.N.Y. 1952) (“We examine now the rhythm, harmony and melody of both songs to determine whether similarity exists.”)

As a backstop, the Amended Opinion concluded “but we do not understand Baxter’s claim to center solely on one six-note sequence.”²⁸ In fact, that *was* Baxter’s only claim of similarity. But even if the court had a claim of “comprehensive non-literal similarity” (3 *Nimmer*, § 13.03 [A][1]; *Warner Bros.*, 720 F.2d at 240, 242) in mind, while Baxter’s song taken as a whole is certainly copyrightable, the subject songs are by no means substantially the same in their “total concept and feel”. *Krofft*, 562 F.2d at 1167.

Most alarming is the decision’s implication that whether a portion of a work is copyrightable (App. at 10, ¶ 2) depends upon the trier’s conclusion about some vague calculus (“qualitative” or quantitative” significance) of the extent of use, unfocused on neither the protectibility nor materiality of the derived matter. (App. at 10, ¶ 3). All authority is to the contrary. E.g., *Walker*, 784 F.2d at 49-51; *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir. 1984). The court

²⁷ The panel’s implied ruling that fragments of musical ideas or cliches are copyrightable directly conflicts with decisions in literary and factual contexts holding that the use of ideas, cliches, scenes-a-faire and other staples of literature cannot raise a triable issue of fact. See, e.g., *Walker*, 784 F.2d at 50; *Berkic v. Crichton*, 761 F.2d at 1293-94.

²⁸ This alternative theory of liability was never discussed in the Amended Opinion.

of appeals would have the issues of *copyrightability and infringement* depend solely on *derivation*.²⁹ This would violate the idea/expression dichotomy.

2. Whether Any Arguable Taking of Expression Was Arguably Substantial.

If similarities of expression arguably existed, it remained for the court of appeals to determine whether "substantial" amounts (quantitatively or qualitatively) arguably were taken. The court of appeals seemed to reason that because "no bright line exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity", "the ear of the court must yield to the ears of the jurors." App. at 10. Such a holding directly conflicts with the rule of the Second Circuit that "a district court may determine noninfringement as a matter of law on a motion for summary judgment either (1) when the similarity concerns only non-copyrightable elements of plaintiff's work, or (2) when no reasonable trier of fact could find the works substan-

²⁹ This was most manifest in the initial Opinion's conclusion (later withdrawn) that the Inverse Ratio Rule of copying solved the question whether unlawful appropriation occurred. (App. at 23, ¶ 1). The Amended Opinion still manifests that conclusion. The cases cited to suggest that the six-note segment constituted expression (App. at 6-7) do not analyze whether the allegedly copied sequence constituted expression, but with one exception either focus on whether the similarities indicated *derivation* (*Heim, Fred Fisher*) or whether *admitted infringement* was excused by "fair use" (*Walt Disney, Meeropol, Robertson*). The exception, *Harold Lloyd*, ruled that copying of 57 consecutive scenes from a film constituted infringement. The court of appeal's reliance on Professor Nimmer's cited suggestion that copying of *three successive bars* of music might constitute infringement indicates a misapprehension of the facts of the case. The segment here is *less than one bar*.

tially similar.” *Walker*, 784 F.2d at 48. Accord: *Warner Bros., Inc.*, 720 F.2d at 240.

Clearly, here there is no arguable taking that amounts to “comprehensive non-literal similarity.” Nor, focusing on the “fragmented literal similarity” claim, either four or six notes, is substantial taking arguable. The court of appeals’ citation to 3 *Nimmer*, 13.03[A][2] (App. at 10) reveals the source of its error. There, *Nimmer* writes about *fragmented literal taking*:

No easy rule of thumb can be stated as to the quantum of fragmented literal similarity permitted without crossing the line of substantial similarity.

The court of appeals apparently overlooked the following, two sentences further on in the treatise:

The question in each case is whether the similarity relates to matter which constitutes *a substantial portion of plaintiff’s work*—not whether such material constitutes a substantial portion of defendant’s work.

3 *Nimmer*, § 13.03[A][2] at 13-27. (Emphasis added). Any proper application of the “audience test” would conclude that no reasonable jury properly instructed could conclude that the four- or six- note segments at issue constitute a substantial and material part of *plaintiff’s work*. The E.T. Theme simply does not diminish the demand for JOY by serving as a functional equivalent.³⁰ By failing to acknowledge the possibility of a *de minimis* rule, the deci-

³⁰ In fact, the audience test modified by the “demand” test should be applied: whether the defendant’s “copy” decreased the demand for plaintiff’s work by fulfilling *the same function* as plaintiff’s work. Sherman, “Musical Copyright Infringement: The Requirement of Substantial Similarity”, 22 ASCAP Copyright Law Symposium 81, 114-144 (1977); 3 *Nimmer*, § 13.03[A] at 13-39, citing *Folsom v. Marsh*, 9 Fed.Cas.342, No. 4901 (C.C. Mass. 1841) (Story, J.).

sion below stands in conflict with other federal circuit courts. *E.g.*, *Warner Bros.*, 720 F.2d at 242; *G.R. Leonard & Co. v. Stack*, 386 F.2d 38, 40 (7th Cir. 1967).

D. The Federal Circuit Courts Have Been Unable To Resolve The Ambiguities and The Inconsistencies Between Them.

The federal circuit courts are unable to resolve their differences; *Krofft* and *Arnstein* approach the substantial similarity of expression issue from fundamentally different points of departure. Nor is the Ninth Circuit able to resolve its own internal inconsistencies.³¹ Ironically, Ninth Circuit decisions mimic those decisions criticized by *Krofft* that "pay only lipservice to the idea-expression dichotomy distinction . . . This is a criticism . . . that can be alleviated by the courts being more deliberative in their consideration of this issue," *Krofft*, 562 F.2d at 1163 n.6, precisely because they are hobbled by the *Krofft* test.

II. THE DECISION BELOW CONFLICTS WITH RECENT DECISIONS OF THIS COURT IN REQUIRING MOVANTS FOR SUMMARY JUDGMENT TO ESTABLISH A "BRIGHT LINE" TO DISPROVE ANY POSSIBLE SIMILARITY BETWEEN THE WORKS.

A. The Ghost Of Arnstein's "Slightest Doubt" Rule.

For many years, an anti-summary judgment bias existed in the federal circuit courts, exemplified by the copyright infringement decision in *Arnstein*, which held that

³¹ Although 466 petitions for rehearing *en banc* were filed in the Ninth Circuit last year, only 5 were granted and only one to resolve conflicts. *Los Angeles Daily Journal*, 9/2/87, pp. 1, 7.

summary judgment was disfavored and unavailable where the “slightest doubt” as to a factual dispute existed.³² However, after the 1963 amendment to Federal Rule of Civil Procedure 56(e), this Court held that summary judgment could be defeated only upon a showing of “significant probative evidence”. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968). The Second Circuit recognized that *First National* disposed of *Arnstein’s* “slightest doubt” rule. *E.g., Heyman v. Commerce & Ind. Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975). As a result, one treatise writer has concluded that *Arnstein* and its progeny are “mere mementos of law gone by” on the procedural standard. 6 Pt. 2 *Moore’s Federal Practice* ¶ 56.17[14] at 56-798 (2d ed. 1985).³³

But in the Ninth Circuit “slightest doubt” dies hard. The Initial Opinion below, by Judge Tang, reinstated *Arnstein’s* slightest doubt rule by holding that “since substantial similarity is usually an extremely close issue of fact, summary judgment is *disfavored* on that issue as a general rule.” App. at 22 (emphasis added).³⁴ While at-

³² As a result, no published decision of the Ninth Circuit affirmed summary judgment for lack of substantial similarity of expression until *Jason v. Fonda*, 698 F.2d 966 (9th Cir. 1982).

³³ The Ninth Circuit acknowledged *Arnstein’s* demise as a standard for summary judgment in *Krofft*, 562 F.2d at 1165, and again in *See v. Durang*, 711 F.2d at 143.

³⁴ In *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983), Judge Tang’s original slip opinion reversed a summary judgment granted for lack of substantial similarity, citing *Arnstein* and its progeny, *Goodson-Todman* and *Morrissey*, and making an *Arnstein*-like statement that

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tempting to cover the tracks of its misreliance on *Arnstein*, the Amended Opinion still hosts its spirit, in direct conflict with *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986). In particular,

1. The Initial Opinion treated summary judgment as "disfavored." (App. at 22) in direct conflict with *Celotex*, 106 S.Ct. at 2555.³⁵

2. In conflict with *Celotex's* holding that the moving party need not show the absence of a genuine issue where the non-moving party bears the burden of proof, 106 S.Ct. at 2553, the Amended Opinion still:

(a) implies that defendants had and failed to carry a burden of disproving that similarities other than a 4- of 6-note segment were arguably infringing. (App. at 11, 25);

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summary judgment in copyright infringement cases is "disfavored". After defendants' petition for rehearing pointed out that the panel was relying on the discredited *Arnstein* rule, it simply struck the references to *Arnstein*, *Goodson-Todman* and *Morrissey*, inserting instead a reference to *Krofft* (Order, App. at 52), but leaving intact the anti-summary judgment language of *Arnstein* and its progeny. To this day, decisions of the Ninth Circuit are burdened by the *Arnstein*-like language adopted by Judge Tang in *Twentieth*.

³⁵ It justified this conclusion by reasoning that the similarity issue is "usually an extremely close issue of fact". App. at 22 (emphasis added). But, because the idea/expression dichotomy involves policy issues, *Krofft*, 562 F.2d at 1163, note 13, *supra*, a mixed issue of fact and law exists. See *Harper*, 471 U.S. at 560 ("fair use" a mixed issue). Moreover, since no dispute exists in the record about the contents of the works, none of the other anti-summary judgment admonitions about "credibility," "weighing evidence" or drawing inferences is relevant here where the works themselves are the only evidence of their content. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 52 (2d Cir. 1986).

(b) shifts to defendants the burden of proving that "the absence of similarities is so patent as to warrant summary judgment. See *Arnstein*, 154 F.2d at 473." (App. at 23);³⁶

(c) requires defendants to show that a "bright line exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity;" (App. at 10, 23).

(d) requires defendants to show that the two works "are so dissimilar that reasonable minds could not differ as to a lack of substantial similarity between them." (App. at 11-12).

B. The Decision Below Attempts To Reinstate The Slightest Doubt Rule Of *Arnstein* In The Guise Of A "No Bright Line" Test In Conflict With Recent Decisions Of This Court And Of Other Federal Circuit Courts.

The court of appeals' Amended Opinion (App. at 10) ambiguously relies on the absence of a "bright line" rule to evade determining (1) whether a six-note sequence arguably is protectible or (2) whether enough was taken to constitute infringement. First, the absence of a clear line

³⁶ Although the court of appeals omitted this sentence from its Amended Opinion, it accomplishes the same effect by stating as "the only question before us . . . whether . . . substantial similarity of expression was 'totally lacking'." (App. at 8).

does not excuse the duty to draw it³⁷ or at least to define the parameters of protection.³⁸

Before *Krofft*, the Ninth Circuit acknowledged that "the critical distinction between 'idea' and 'expression' is difficult to draw" and suspected that "the classification the court selects may simply state the result reached rather than the reason for it"; it saw the "difference [as] really one of degree" and "the guiding consideration in drawing the line . . . the preservation of the balance between competition and protection reflected . . . in copyright laws." *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971); note 13, *supra*.

Similarly, the fact that Congress chose not to adopt a "bright-line approach to fair use", *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31, has not deterred courts from applying fair use standards as a matter of law. *Harper*, 471 U.S. at 560; *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

³⁷ "... while we are as aware as any one that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930) (Hand, L.).

³⁸ The decision below conflicts with the Second Circuit's view that "courts have an important responsibility in copyright cases to monitor the outer limits within which juries may determine reasonably disputed issues of fact. If a case lies beyond those limits, the contrary view . . . even of a particular jury, cannot be permitted to enlarge (or diminish) the scope of statutory protection enjoyed by a copyright proprietor." *Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 245 (2d Cir. 1983) (affirming summary judgment).

The court of appeals has concluded that because it is difficult to apply the idea/expression dichotomy, the best course is to abandon the effort. By calling the issue a mere issue of fact, it leaves the administration of the copyright laws to juries—purposely unaided by any principled tests—and then shuts the door on appellate review. This may free appellate dockets; it is guaranteed to congest trial courts and will assuredly create havoc in the marketplace and ultimately defeat the encouragement and progress of the arts intended by Congress.

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CONCLUSION

This petition for writ of certiorari should be granted.

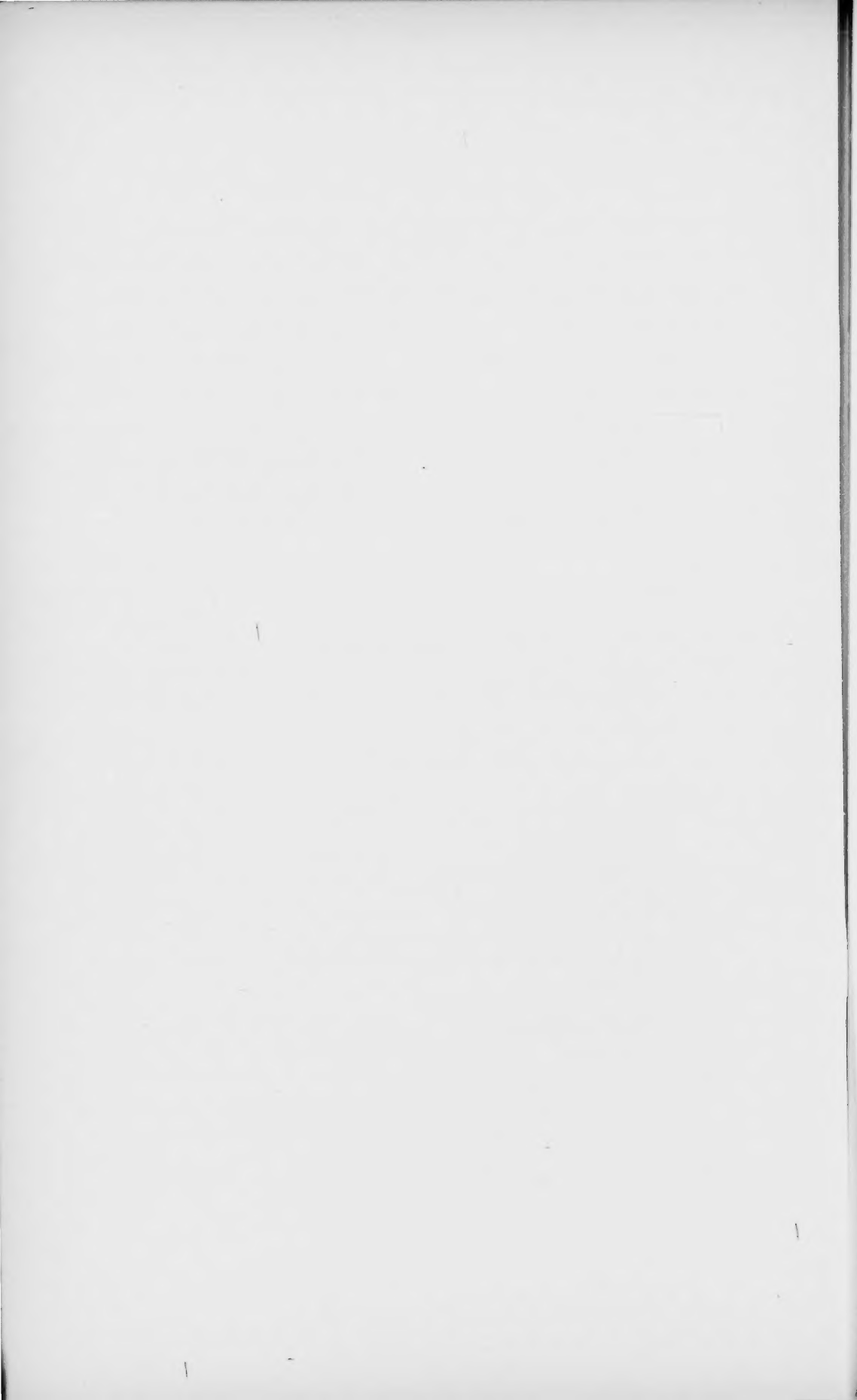
Respectfully submitted,

RONALD S. ROSEN
 (Counsel of Record)
 MARSHA E. DURKO
 SILVERBERG, ROSEN, LEON
 & BEHR
 2029 Century Park East
 Suite 1900
 Los Angeles, CA 90067-3274
 (213) 277-4500

*Attorneys for Petitioner
 John T. Williams*

LOUIS P. PETRICH
 (Counsel of Record)
 EDWARD A. RUTTENBERG
 LEOPOLD, PETRICH & SMITH
 A Professional Corporation
 2049 Century Park East
 Suite 3110
 Los Angeles, CA 90067-3274
 (213) 277-3333

*Attorneys for Petitioners
 MCA Inc., Universal City
 Studios, Music Corporation
 of America Inc.,
 MCA Records, Inc.,
 Merchandising Corporation
 of America, Inc.*



QUESTIONS PRESENTED

The Copyright Clause of the Constitution, the Copyright Act of 1976, and the First Amendment mandate the “idea/expression dichotomy,” which ensures that only an author’s expression, and not the underlying ideas or facts contained in his work, may be protected under the copyright laws. The questions presented by this case are:

1. Whether the court of appeals may adopt a rule for determination of infringement that discards the idea/expression dichotomy by failing to distinguish ideas from expression and by empowering a trier of fact to find infringement uncontrolled by any principled standard?

2. Whether the court of appeals may adopt a rule for determination of infringement that permits the trier of fact to impose liability based on the amount of a defendant’s alleged use without regard to whether the matter used is protectible and material?

3. Having adopted a standard to determine infringement that does not properly focus on the idea/expression dichotomy or the materiality of the claimed use, may a federal court, on the ground that no “bright line” exists to define when substantial amounts of protectible expression have been taken, abdicate its duty to set the parameters within which a trier may find infringement?

4. Whether on a motion for summary judgment under Rule 56, the burden shifts to the moving party defendant to make a “bright line” showing that no substantial protectible expression of plaintiff’s work has been taken?

LIST OF PARTIES

The parties to the proceedings below are Leslie T. Baxter, plaintiff-appellant below, respondent herein, and John T. Williams and MCA Inc., and its subsidiaries, Universal City Studios, Inc., Music Corporation of America, Inc., MCA Records, Inc. and Merchandising Corporation of America, Inc., defendants-appellees below, petitioners herein.

Petitioners MCA Inc., and/or Universal City Studios, Inc., Music Corporation of America, Inc., MCA Records, Inc. and Merchandising Corporation of America, Inc. have the following partially owned subsidiaries and/or affiliates (referred to by Rule 28.1): Cinema International Corporation N.V.; Cineplex Odeon Corporation; Mood Music Company, Inc.; Overland Stage, Inc.; Quantum Media, Inc.; Supreme Music Corporation; Town Cinema Investments Pty. Ltd.; Western Costume Co.



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Supreme Court, U.S.

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No. 87-.....

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1987

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JOHN T. WILLIAMS; MCA INC.; UNIVERSAL CITY
STUDIOS.; MUSIC CORPORATION OF AMERICA;
INC.; MCA RECORDS, INC.; and MERCHANDISING
CORPORATION OF AMERICA, INC.,

Petitioners,

vs.

LESLIE T. BAXTER,

Respondents.

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**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

— 0 —
**APPENDIX TO PETITION FOR WRIT
OF CERTIORARI**

— 0 —
RONALD S. ROSEN
(Counsel of Record)
MARSHA E. DURKO
SILVERBERG, ROSEN, LEON
& BEHR
2029 Century Park East
Suite 1900
Los Angeles, CA 90067-3274
(213) 277-4500

*Attorneys for Petitioner
John T. Williams*

LOUIS P. PETRICH
(Counsel of Record)
EDWARD A. RUTTENBERG
LEOPOLD, PETRICH & SMITH
A Professional Corporation
2049 Century Park East
Suite 3100
Los Angeles, CA 90067-3274
(213) 277-3333

*Attorneys for Petitioners
MCA Inc., Universal City
Studios, Music Corporation
of America Inc.,
MCA Records, Inc.
Merchandising Corporation
of America, Inc.*

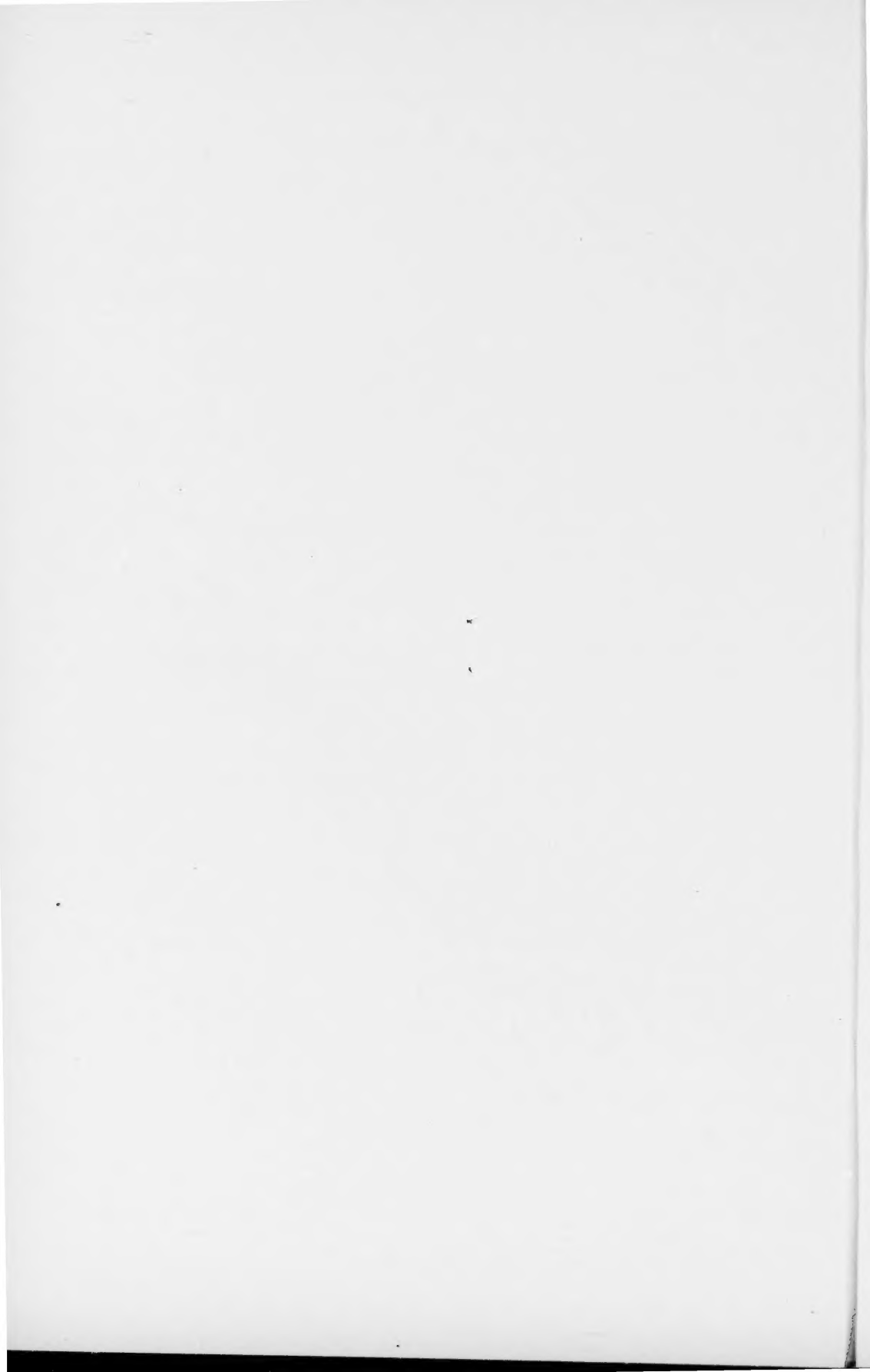
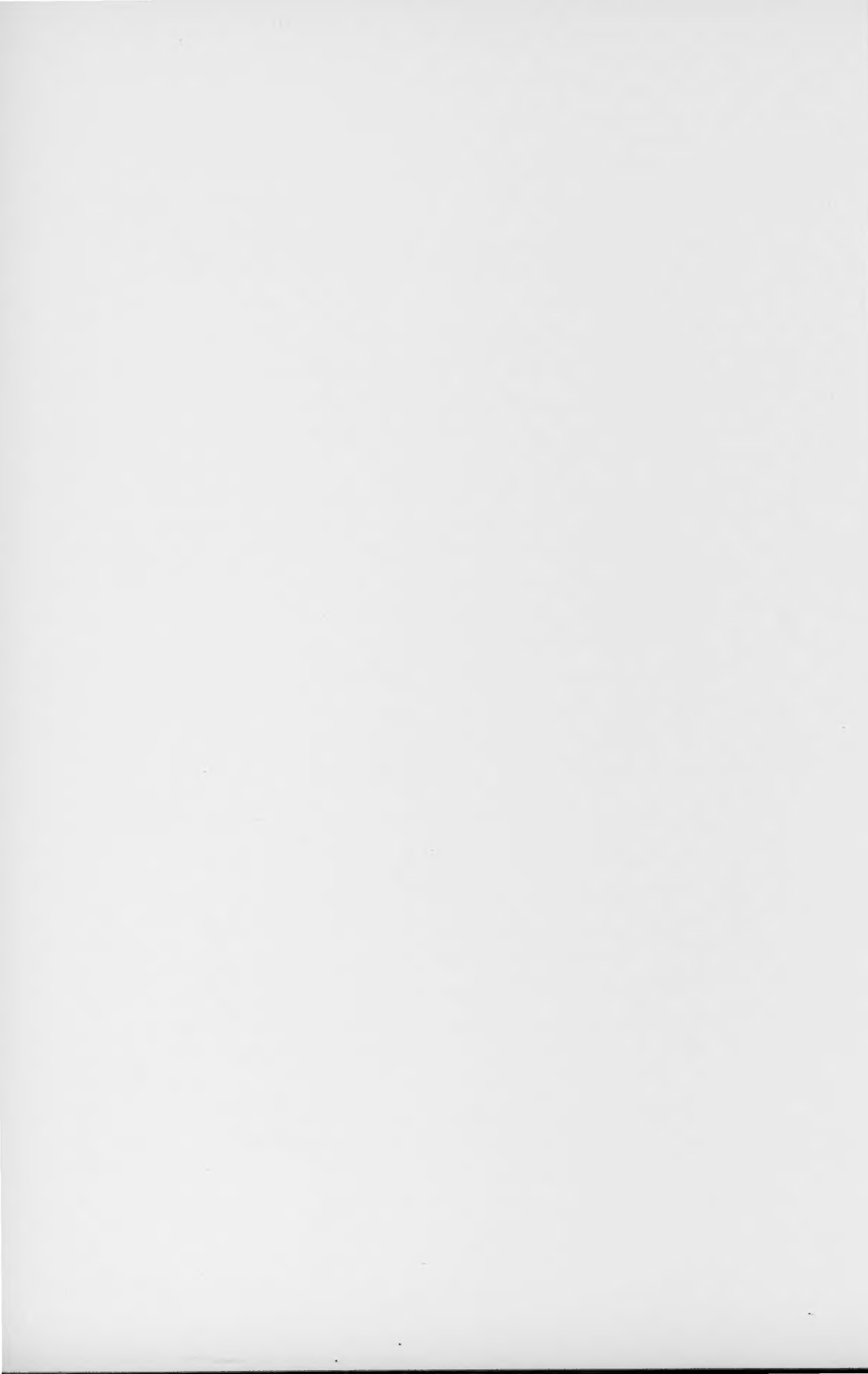


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APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LESLIE T. BAXTER,
Plaintiff-Appellant,

v.

MCA, Inc., a Delaware
corporation; UNIVERSAL CITY
STUDIOS, Inc., a Delaware
corporation, MUSIC CORPORATION
OF AMERICA, a California
corporation; MCA Records, Inc.,
a California corporation;
MERCHANDISING CORPORATION OF
AMERICA, a California corporation;
and JOHN T. WILLIAMS,

No. 84-6522

D.C. No.
CV 83-7081 HLH
ORDER AND
AMENDED
OPINION

Defendants-Appellees.

Argued and Submitted
October 9, 1985—San Francisco, California

Filed March 5, 1987
Amended May 11, 1987

Before: Thomas Tang, Robert Boochever and
Alex Kozinski*, Circuit Judges.

Opinion by Judge Tang

*Judge Duniway, since deceased, was a member of the panel that originally heard oral argument in this case. Judge Kozinski was chosen by lot to replace Judge Duniway on the panel, and has had the benefit of listening to the tapes of oral argument, as well as reading the briefs and reviewing the record and exhibits in his consideration of the case.

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

SUMMARY

Copyright, Patent and Trademark

Appeal from a district court's grant of summary judgment in a copyright action. Reversed and remanded.

Appellant Leslie Baxter (Baxter) composed the song "Joy" in 1953, and is sole owner of all rights in the song. Defendant John Williams (Williams) was acquainted with Baxter and with the song. In 1982, Williams composed the Theme from E.T., which was used by the other defendants in a motion picture, sound recordings and merchandising. Baxter filed a complaint for copyright infringement and demand for jury trial in district court, alleging the Theme from E.T. was largely copied from Joy. The defendants moved for summary judgment on the ground that, as a matter of law, Theme from E.T. was not substantially similar to protectable expression in Joy, and therefore did not infringe it. For purposes of the motion the issues of ownership of Joy, access to the song, and similarity of the "general ideas" was conceded. The district court granted, stating that similarity was totally lacking and could not be submitted to a jury.

[1] The district court's grant of summary judgment to the defendants must be affirmed if reasonable minds could not differ as to the presence or absence of substantial similarity of expression. [2] Since many issues were conceded for purposes of the summary judgment motion, the only question before the court is whether the district court's finding, based on its ear, that substan-

tial similarity of expression was “totally lacking and could not be submitted to a jury” can sustain a judgment to the defendants. [3] Summary judgment cannot be granted if there exists a genuine dispute as to a material fact, [4] and determinations of substantial similarity of expression are subtle and complex. [5] Based on a review of the record, the court is convinced that reasonable minds could differ as to whether the songs are substantially similar.

[6] To accept the defendants’ argument that the similarity can be reduced to a six-note sequence which cannot be copyrighted would be to ignore the fundamental notion that no bright line rule exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity. The ear of the court must yield to the ears of jurors. Evidence that the sequence is found in other works would be admissible to rebut an inference of copying (because it would show that the sequence is so common that the probability of independent, coincidental creation was high), [7] but Baxter’s claim does not center on one six-note sequence. [8] The district court erred in granting the defendants’ motion for summary judgment.

COUNSEL

John T. Blanchard, Los Angeles, California, for the plaintiff-appellant.

Louis P. Petrich, Los Angeles, California, for the defendants-appellees, MCA, et al.

Ronald S. Rosen, Los Angeles, California, for the defendant-appellee, John T. Williams.

ORDER

The opinion filed March 5, 1987 is hereby amended as follows: (1) at slip op. page 9, delete the paragraph numbered 5, and last sentence and citation in the paragraph numbered 6; (2) at slip op. page 10, delete the first full paragraph numbered 7.

It is so ordered.

OPINION

TANG, Circuit Judge:

In this copyright infringement action, plaintiff-appellant Leslie T. Baxter appeals the district court's grant of summary judgment to John Williams and the other defendants-appellees. The district court granted defendants' motion based upon its determination that no substantial similarity of expression existed as between Baxter's copyrighted song **Joy** and the theme from the motion picture "E.T.: The Extra-Terrestrial" [hereinafter cited as **Theme from E.T.**]. We reverse the grant of summary judgment and remand for trial.

FACTS AND PROCEDURAL HISTORY

In 1953, Leslie Baxter composed a collection of seven songs intended to invoke or represent emotions. These songs were recorded and published by Capitol Records in 1954 on an album entitled **The Passions**. **Joy**, one of the compositions on that album, is the subject of this action.¹

¹Since **Joy** was published and fixed in a sound recording prior to February 15, 1972, it was not eligible for copyright registration. Baxter's claim rests on **Joy** as registered sheet music which was copyrighted on February 8, 1954 and renewed on August 20, 1982.

Baxter is the sole owner of all right, title and interest in the copyright to **Joy**.

Baxter and John Williams, a successful composer and conductor of music, have been personally acquainted for several decades. Williams had previously played the piano for Baxter at a number of recording sessions, and had knowledge of **Joy**. He participated as the pianist in the orchestra for a public performance of **Joy** in the Hollywood Bowl in the 1960s. In 1982, Williams composed **Theme from E.T.** for which he received an Academy Award for best original music. The other appellees utilized **Theme from E.T.** in the motion picture "E.T.: The Extra-Terrestrial," sound recordings and merchandising.

On November 2, 1983, Baxter filed a complaint for copyright infringement and demand for jury trial in district court. He alleged that **Theme from E.T.** was largely copied from his copyrighted song **Joy**. On September 17, 1984, defendants moved for summary judgment on the ground that, as a matter of law, **Theme from E.T.** was not substantially similar to protectible expression in **Joy**, and therefore did not infringe it. For the limited purpose of the summary judgment motion only, defendants conceded that: (1) Baxter owned a duly registered copyright in **Joy**; (2) Williams had "access" to **Joy** before the creation of **Theme from E.T.**; and (3) the "general ideas" in the subject songs were substantially similar.

Defendants attached to their motion papers the following items: (1) cassette tape recordings of **Joy** as it appeared on the album **The Passions** and the movie soundtrack of **Theme from E.T.**, (2) the twenty-three page written instrumental sheet music of **Joy** that was copyrighted;

and (3) the five page piano score of **Theme from E.T.** Baxter introduced into evidence expert testimony and five comparison tapes by Professor Harvey Bacal regarding the degree of similarity between the two compositions.

After reviewing the submitted evidence, the district court granted defendants' motion for summary judgment, stating:

This Court's "ear" is as lay as they come. The Court cannot hear any substantial similarity between defendant's expression of the idea and plaintiff's. Until Professor Bacal's tapes were listened to, the Court could not even tell what the complaint was about. Granted that Professor Bacal's comparison exposes a musical similarity in sequence of notes which would, perhaps, be obvious to experts, the similarity of expression (or impression as a whole) is totally lacking and could not be submitted to a jury.

Baxter timely appealed.

II. STANDARD OF REVIEW

[1] After the defendants stipulated to the plaintiff's ownership of the copyright and access to his work, the district court ruled as a matter of law that there was no substantial similarity between the two works. That holding is subject to our *de novo* review. *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985), *cert. denied*, — U.S. —, 106 S. Ct. 85 (1985). We review the evidence and the inferences therefrom in the light most favorable to the non-moving party, and determine whether there exists any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *RFD Publications, Inc. v. Oregonian Pub. Co.*, 749 F.2d 1327, 1328 (9th Cir. 1984) *accord Twentieth Century Fox Film Corp. v. MCA*, 715

F.2d 1327, 1328 (9th Cir. 1983). The district court's grant of summary judgment to the defendants must be affirmed if reasonable minds could not differ as to the presence or absence of substantial similarity of expression. *See v. Durang*, 711 F.2d 141 (9th Cir. 1983). *See also Twentieth Century-Fox*, 715 F.2d at 1329.

DISCUSSION

[2] To establish a successful claim for copyright infringement, the plaintiff must prove (1) ownership of the copyright, and (2) "copying" of protectible expression by the defendant. *See Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977) (citing *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975), *cert. denied*, 423 U.S. 863 (1975); 2 M. Nimmer, *Nimmer on Copyright* § 141 at 610-611 (1979) [hereinafter cited as "Nimmer"]). Because direct evidence of copying is rarely available, a plaintiff may establish copying by circumstantial evidence of: (1) defendant's access to the copyrighted work prior to the creation of defendant's work, and (2) substantial similarity of both general ideas and expression between the copyrighted work and the defendant's work. *See Krofft*, 562 F.2d at 1162. Absent evidence of access, a "striking similarity" between the works may give rise to a permissible inference of copying. *See Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984); *Shultz v. Holmes*, 264 F.2d 942 (9th Cir. 1959); Nimmer § 13.02[B] at 13-14 (1986). Baxter's ownership of the copyright to **Joy** is undisputed, and defendants conceded access for the purpose of their summary

judgment motion. Defendants further assumed for purposes of their motion that there was substantial similarity of ideas as between the two compositions. Therefore, the only question² before us is whether the district court's finding, based on its ear, that substantial similarity of expression was "totally lacking and could not be submitted to a jury," can sustain a grant of summary judgment to the defendants.

[3] Summary judgment cannot be granted if there exists a genuine dispute as to a material fact. Fed. R. Civ. P. 56(e). Rule 56 calls for the judge to determine whether there exists a genuine issue for trial, not to weigh the evi-

²Baxter argues that he should also have been permitted to prove copyright infringement by way of expert testimony and analytic dissection which allegedly demonstrated the two works' "striking similarity." This contention misapprehends the nature of the "striking similarity" doctrine. Proof of striking similarity is an alternative means of proving "copying" where proof of access is absent. See *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984); *Nimmer* § 13,02[B] at 13-14, 13-15 (1986). Yet here, access was conceded and is thus not in issue. It was thus unnecessary to consider the possibility that *Theme from E.T.* was the product of independent creation, coincidence, a prior common source, or any source other than copying. See *id.* Upon remand, however, Baxter's expert testimony and analytic dissection offered as to "striking similarity" would certainly merit submission to a jury as to the substantial similarity of general ideas as between the two works. See *Krofft*, 562 F.2d at 1164.

Baxter further contends that judicial protection beyond the "lay audience" test is required for authors of works in technical fields such as music because an infringer can easily deceive the unsophisticated by immaterial variations in the copyrighted work. It is unnecessary to reach this issue, given our holding that the grant of summary judgment constituted reversible error. No compelling reason appears, however, to depart from the principles enunciated in *Krofft*, which reiterates that the test of substantial similarity depends upon the response of the ordinary lay listener. See *Krofft*, 562 F.2d at 1164.

dence himself and determine the truth of the matter. *See Anderson v. Liberty Lobby, Inc.*, — U.S. —, 106 S. Ct. 2505, 2516 (1986). The non-moving party must present evidence sufficient to require a jury or judge to resolve the parties' differing versions of the truth at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968). Inferences to be drawn from facts contained in the moving party's papers are to be viewed by the district court in the light most favorable to the non-moving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Weighing evidence, determining credibility, and drawing inferences from facts remain jury functions which may not be undertaken by the trial judge. *See Anderson*, 106 S. Ct. at 2513.

[4] Determinations of substantial similarity of expression are subtle and complex. The test to be applied has been labeled an "intrinsic" one by this Court in that it depends not upon external criteria, but instead upon the response of the ordinary reasonable person to the works. *Krofft*, 562 F.2d at 1164. "Analytic dissection" and expert testimony are not called for; the gauge of substantial similarity is the response of the ordinary lay hearer. *Id.*, quoting *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947). Accordingly, in *Krofft*, this Court rejected extrinsic analysis of similarities and differences among characters in plaintiff's television show and defendants' TV commercials, in favor of asking whether the defendants' works captured the total concept and feel of plaintiffs' works. *Krofft*, 562 F.2d at 1167. *See also Berkic*, 761 F.2d at 1292; *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984), *cert. denied*, — U.S. —, 105 S. Ct. 1753 (1985); *Overman v. Universal*

City Studios, Inc., 605 F.Supp. 350, 353 (C.D. Cal. 1984), *aff'd mem.*, No. 84-6009 (9th Cir. July 2, 1985).

[5] We do not suggest that our ears are any more sophisticated than those of the district court. Nevertheless, based on our review of the record, we are persuaded that reasonable minds could differ as to whether **Joy** and **Theme from E.T.** are substantially similar. As in *Twentieth Century-Fox*, we do not suggest that the works are, in fact, substantially similar. We only state that reasonable minds could differ as to the issue and thus that summary judgment was improper. *See Twentieth-Century-Fox*, 715 F.2d at 1329.

We finally address defendants' contention that any similarity between the works can be reduced to a six-note sequence which is not protectible expression under the copyright laws. We disagree.

[6] Even were we to accept *arguendo* defendants' argument over Baxter's response that it is not a six-note sequence but the entire work whose similarity is at issue, this argument ignores the fundamental notion that no bright line rule exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity. *See generally* 3 M. Nimmer, Nimmer on Copyright § 13.03[A][2] (1986). Here, the ear of the court must yield to the ears of jurors. *See Roy Export Co. Establishment v. CBS*, 503 F.Supp. 1137, 1145 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982), *cert. denied*, 459 U.S. 826 (1982). Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity. *See Walt Disney Productions v. Air Pirates*,

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581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1978); *Universal Pictures v. Harold Lloyd*, 162 F.2d 354 (9th Cir. 1947); *Heim v. Universal Pictures Co.*, 154 F.2d 480, 488 (single brief phrase so idiosyncratic as to preclude coincidence might suffice to show copying) (dictum); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924) (L. Hand, J.) (eight note "ostinato" held to infringe copyright in song). *See also Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977) (words copied amounted to less than one percent of defendant's entire work; fair use), *cert. denied*, 434 U.S. 1013 (1977); *Robertson v. Batten, Barton, Durstine & Osborne, Inc.*, 146 F.Supp. 795, 798 (S.D. Cal. 1956) (portions of song used constituted element upon which popular appeal and hence commercial success depended; fair use). *See generally* Nimmer § 13.03[A][2] at 13-36, and citations therein (notion that copying of three bars from musical work can never constitute infringement is without foundation). Certainly, evidence that the sequence in question is found in other works would be admissible to rebut an inference of copying; such evidence demonstrates that the sequence is so common that the probability of independent, coincidental creation was high. *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976).

[7] But we do not understand Baxter's claim to center solely on one six-note sequence. The jury upon remand may, of course, determine that any similarity is confined to the sequence, and that the similarity is insubstantial.

CONCLUSION:

[8] Based upon our review of the record, we cannot say that **Joy** and **Theme from E.T.** are so dissimilar that

reasonable minds could not differ as to a lack of substantial similarity between them. Therefore, the district court erred in granting defendants' motion for summary judgment.

Reversed and remanded for proceedings not inconsistent with this opinion.

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESLIE T. BAXTER,

Plaintiff-Appellant,

v.

MCA, Inc., a Delaware
corporation; UNIVERSAL CITY
STUDIOS, Inc., a Delaware
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OF AMERICA, a California
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California corporation;
MERCHANDISING CORPORATION OF
AMERICA, a California corporation;
and JOHN T. WILLIAMS,

No. 84-6522

D.C. No.
CV 83-7081 HLH

OPINION

Defendants-Appellees.

Argued and Submitted

October 9, 1985—San Francisco, California

Filed March 5, 1987

Before: Thomas Tang, Robert Boochever and
Alex Kozinski*, Circuit Judges.

Opinion by Judge Tang

*Judge Duniway, since deceased, was a member of the panel that originally heard oral argument in this case. Judge Kozinski was chosen by lot to replace Judge Duniway on the panel, and has had the benefit of listening to the tapes of oral argument, as well as reading the briefs and reviewing the record and exhibits in his consideration of the case.

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Harry L. Hupp, District Judge, Presiding

SUMMARY

Copyright, Patent and Trademark

Appeal from a district court's grant of summary judgment in a copyright action. Reversed and remanded.

Appellant Leslie Baxter (Baxter) composed the song "Joy" in 1953, and is sole owner of all rights in the song. Defendant John Williams (Williams) was acquainted with Baxter and with the song. In 1982, Williams composed the Theme from E.T., which was used by the other defendants in a motion picture, sound recordings and merchandising. Baxter filed a complaint for copyright infringement and demand for jury trial in district court, alleging the Theme from E.T. was largely copied from Joy. The defendants moved for summary judgment on the ground that, as a matter of law, Theme from E.T. was not substantially similar to protectable expression in Joy, and therefore did not infringe it. For purposes of the motion the issues of ownership of Joy, access to the song, and similarity of the "general ideas" was conceded. The district court granted, stating that similarity was totally lacking and could not be submitted to a jury.

[1] The district court's grant of summary judgment to the defendants must be affirmed if reasonable minds could not differ as to the presence or absence of substantial similarity of expression. [2] Since many issues were conceded for purposes of the summary judgment motion, the only question before the court is whether the district

court's finding, based on its ear, that substantial similarity of expression was "totally lacking and could not be submitted to a jury" can sustain a judgment to the defendants. [3] Summary judgment cannot be granted if there exists a genuine dispute as to a material fact, [4] and determinations of substantial similarity of expression are subtle and complex. [5] Since substantial similarity is usually an extremely close issue of fact, summary judgment is disfavored on that issue as a general rule, although summary judgment is not barred where the works are so dissimilar that reasonable minds could not differ as to the absence of substantial similarity. [6] Based on a review of the record, the court is convinced that reasonable minds could differ as to whether the songs are substantially similar. [7] This result is appropriate in light of the concession of access, which may have lowered the quantum of proof required for a jury to find substantial similarity, had there been a trial.

[8] To accept the defendants' argument that the similarity can be reduced to a six-note sequence which cannot be copyrighted would be to ignore the fundamental notion that no bright line rule exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity. The ear of the court must yield to the ears of jurors. Evidence that the sequence is found in other works would be admissible to rebut an inference of copying (because it would show that the sequence is so common that the probability of independent, coincidental creation was high), [9] but Baxter's claim does not center on one six-note sequence. [10] The district court erred in granting the defendants' motion for summary judgment.

COUNSEL

John T. Blanchard, Los Angeles, California, for the plaintiff-appellant.

Louis P. Petrich, Los Angeles, California, for the defendants-appellees, MCA, et al.

Ronald S. Rosen, Los Angeles, California, for the defendant-appellee, John T. Williams.

OPINION

TANG, Circuit Judge:

In this copyright infringement action, plaintiff-appellant Leslie T. Baxter appeals the district court's grant of summary judgment to John Williams and the other defendants-appellees. The district court granted defendants' motion based upon its determination that no substantial similarity of expression existed as between Baxter's copyrighted song **Joy** and the theme from the motion picture "E.T.: The Extra-Terrestrial" [hereinafter cited as **Theme from E.T.**] We reverse the grant of summary judgment and remand for trial.

FACTS AND PROCEDURAL HISTORY

In 1953, Leslie Baxter composed a collection of seven songs intended to invoke or represent emotions. These songs were recorded and published by Capital Records in 1954 on an album entitled **The Passions**. **Joy**, one of the compositions on that album, is the subject of this action.¹

¹Since **Joy** was published and fixed in a sound recording prior to February 15, 1972, it was not eligible for copyright registration. Baxter's claim rests on **Joy** as registered sheet music which was copyrighted on February 8, 1954 and renewed on August 20, 1982.

Baxter is the sole owner of all right, title and interest in the copyright to **Joy**.

Baxter and John Williams, a successful composer and conductor of music, have been personally acquainted for several decades. Williams had previously played the piano for Baxter at a number of recording sessions, and had knowledge of **Joy**. He participated as the pianist in the orchestra for a public performance of **Joy** in the Hollywood Bowl in the 1960s. In 1982, Williams composed **Theme from E.T.** for which he received an Academy Award for best original music. The other appellees utilized **Theme from E.T.** in the motion picture "E.T.: The Extra-Terrestrial," sound recordings and merchandising.

On November 2, 1983, Baxter filed a complaint for copyright infringement and demand for jury trial in district court. He alleged that **Theme from E.T.** was largely copied from his copyrighted song **Joy**. On September 17, 1984, defendants moved for summary judgment on the ground that, as a matter of law, **Theme from E.T.** was not substantially similar to protectible expression in **Joy**, and therefore did not infringe it. For the limited purpose of the summary judgment motion only, defendants conceded that: (1) Baxter owned a duly registered copyright in **Joy**; (2) Williams had "access" to **Joy** before the creation of **Theme from E.T.**; and (3) the "general ideas" in the subject songs were substantially similar.

Defendants attached to their motion papers the following items: (1) cassette tape recording of **Joy** as it appeared on the album **The Passions** and the movie soundtrack of **Theme from E.T.**, (2) the twenty-three page written instrumental sheet music of **Joy** that was copyrighted;

and (3) the five page piano score of **Theme from E.T.** Baxter introduced into evidence expert testimony and five comparison tapes by Professor Harvey Bacal regarding the degree of similarity between the two compositions.

After reviewing the submitted evidence, the district court granted defendants' motion for summary judgment, stating:

This Court's "ear" is as lay as they come. The Court cannot hear any substantial similarity between defendant's expression of the idea and plaintiff's. Until Professor Bacal's tapes were listened to, the Court could not even tell what the complaint was about. Granted that Professor Bacal's comparison exposes a musical similarity in sequence of notes which would, perhaps, be obvious to experts, the similarity of expression (or impression as a whole) is totally lacking and could not be submitted to a jury.

Baxter timely appealed.

II. STANDARD OF REVIEW

[1] After the defendants stipulated to the plaintiff's ownership of the copyright and access to his work, the district court ruled as a matter of law that there was no substantial similarity between the two works. That holding is subject to our *de novo* review. *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985), *cert. denied*, — U.S. —, 106 S. Ct. 85 (1985). We review the evidence and the inferences therefrom in the light most favorable to the nonmoving party, and determine whether there exists any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *RFD Publications, Inc. v. Oregonian Pub. Co.*, 749 F.2d 1327, 1328 (9th Cir. 1984) *accord Twentieth Century Fox Film Corp.*

v. MCA, 715 F.2d 1327, 1328 (9th Cir. 1983). The district court's grant of summary judgment to the defendants must be affirmed if reasonable minds could not differ as to the presence or absence of substantial similarity of expression. *See v. Durang*, 711 F.2d 141 (9th Cir. 1983). *See also Twentieth Century-Fox*, 715 F.2d at 1329.

DISCUSSION

[2] To establish a successful claim for copyright infringement, the plaintiff must prove (1) ownership of the copyright, and (2) "copying" of protectible expression by the defendant. *See Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977) (citing *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976); *Universal Athletic Sales Co. v. Sal-keld*, 511 F.2d 904, 907 (3d Cir. 1975), *cert. denied*, 423 U.S. 863 (1975); 2 M. Nimmer, Nimmer on Copyright § 141 at 610-611 (1979) [hereinafter cited as "Nimmer"]). Because direct evidence of copying is rarely available, a plaintiff may establish copying by circumstantial evidence of: (1) defendant's access to the copyrighted work prior to the creation of defendant's work, and (2) substantial similarity of both general ideas and expression between the copyrighted work and the defendant's work. *See Krofft*, 562 F.2d at 1162. Absent evidence of access, a "striking similarity" between the works may give rise to a permissible inference of copying. *See Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984); *Shultz v. Holmes*, 264 F.2d 942 (9th Cir. 1959); Nimmer § 13.02[B] at 13-14 (1986). Baxter's ownership of the copyright to **Joy** is undisputed, and defendants conceded access for the purpose of their sum-

mary judgment motion. Defendants further assumed for purposes of their motion that there was substantial similarity of ideas as between the two compositions. Therefore, the only question² before us is whether the district court's finding, based on its ear, that substantial similarity of expression was "totally lacking and could not be submitted to a jury," can sustain a grant of summary judgment to the defendants.

[3] Summary judgment cannot be granted if there exists a genuine dispute as to a material fact. Fed. R. Civ. P. 56(c). Rule 56 calls for the judge to determine whether there exists a genuine issue for trial, not to weigh the evidence himself and determine the truth of the mat-

²Baxter argues that he should also have been permitted to prove copyright infringement by way of expert testimony and analytic dissection which allegedly demonstrated the two works' "striking similarity." This contention misapprehends the nature of the "striking similarity" doctrine. Proof of striking similarity is an alternative means of proving "copying" where proof of access is absent. See *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984); *Nimmer* § 13.02[B] at 13-14, 13-15 (1986). Yet here, access was conceded and is thus not in issue. It was thus unnecessary to consider the possibility that **Theme from E.T.** was the product of independent creation, coincidence, a prior common source, or any source other than copying. See *id.* Upon remand, however, Baxter's expert testimony and analytic dissection offered as to "striking similarity" would certainly merit submission to a jury as to the substantial similarity of general ideas as between the two works. See *Krofft*, 562 F.2d at 1164.

Baxter further contends that judicial protection beyond the "lay audience" test is required for authors of works in technical fields such as music because an infringer can easily deceive the unsophisticated by immaterial variations in the copyrighted work. It is unnecessary to reach this issue, given our holding that the grant of summary judgment constituted reversible error. No compelling reason appears, however, to depart from the principles enunciated in *Krofft*, which reiterates that the test of substantial similarity depends upon the response of the ordinary lay listener. See *Krofft*, 562 F.2d at 1164.

ter. *See Anderson v. Liberty Lobby, Inc.*, — U.S. —, 106 S.Ct. 2505, 2516 (1986). The non-moving party must present evidence sufficient to require a jury or judge to resolve the parties' differing versions of the truth at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968). Inferences to be drawn from facts contained in the moving party's papers are to be viewed by the district court in the light most favorable to the non-moving party. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1980). Weighing evidence, determining credibility, and drawing inferences from facts remain jury functions which may not be undertaken by the trial judge. *See Anderson*, 106 S.Ct. at 2513.

[4] Determination of substantial similarity of expression are subtle and complex. The test to be applied has been labeled an "intrinsic" one by this Court in that it depends not upon external criteria, but instead upon the response of the ordinary reasonable person to the works. *Krofft*, 562 F.2d at 1164, "Analytic dissection" and expert testimony are not called for; the gauge of substantial similarity is the response of the ordinary lay hearer. *Id.*, quoting *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947). Accordingly, in *Krofft*, this Court rejected extrinsic analysis of similarities and differences among characters in plaintiff's television show and defendants' TV commercials, in favor of asking whether the defendants' works captured the total concept and feel of plaintiffs' works. *Krofft*, 562 F.2d at 1167. *See also Berkic*, 761 F.2d at 1292; *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 1753 (1985); *Overman v. Universal City Studios*,

Inc., 605 F.Supp. 350, 353 (C.D. Cal. 1984), *aff'd mem.*, No. 84-6009 (9th Cir. July 2, 1985).

[5] Since substantial similarity is usually an extremely close issue of fact, summary judgment is disfavored on that issue as a general rule. *See Berkic*, 761 F.2d at 1292; *Litchfield*, 736 F.2d at 1355-1356; *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981), *incorporated by reference*, 698 F.2d 966 (9th Cir. 1982). By no means does this general rule bar a grant of summary judgment, however, where the works are so dissimilar that reasonable minds could not differ as to the absence of substantial similarity. *See Litchfield*, 736 F.2d at 1355-1356 (play and movie); *Beric*, 761 F.2d at 1292 (screenplay and movie); *Jason*, 698 F.2d at 967 (novel and movie); *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1330 (9th Cir. 1983) (movie and television show); *See*, 711 F.2d at 142-143 (plays); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986) (book and movie), *cert. denied*, — U.S. —, 106 S. Ct. 2278 (1986); *Overman*, 605 F.Supp. at 354 (screenplay and movie). The question before us, then, is whether reasonable minds could differ as to the absence of substantial similarity of expression as between **Joy** and **Theme from E.T.**

[6] We do not suggest that our ears are any more sophisticated than those of the district court. Nevertheless, based on our review of the record, we are persuaded that reasonable minds could differ as to whether **Joy** and **Theme from E.T.** are substantially similar. As in *Twentieth Century-Fox*, we do not suggest that the works are, in fact, substantially similar. We only state that reasonable minds could differ as to the issue and thus that sum-

mary judgment was improper. See *Twentieth Century-Fox*, 715 F.2d at 1329. This is simply not a case in which the absence of similarities is so patent as to warrant summary judgment. See *Arnstein*, 154 F.2d at 473.

[7] The result we reach is also appropriate in light of the fact that defendants' concession of access may have lowered the quantum of proof required for a jury to find substantial similarity, had there been a trial. See *Krofft*, 562 F.2d at 1172 (degree of access justifies lower standard of proof necessary to show substantial similarity), quoting *Nimmer* § 143.4 at 634 (1976). As in *Krofft*, this case presents ample evidence of access. Defendant Williams had personal knowledge of **Joy** and participated as the pianist in the orchestra for a public performance of **Joy** in the Hollywood Bowl. In a trial, such evidence of access is relevant to substantial similarity, and merits submission to a jury.³

We finally address defendants' contention that any similarity between the works can be reduced to a six-note sequence which is not protectible expression under the copyright laws. We disagree.

[8] Even were we to accept *arguendo* defendants' argument over Baxter's response that it is not a six-note sequence but the entire work whose similarity is at issue, this argument ignores the fundamental notion that no bright line rule exists as to what quantum of similarity is

³It is clear, however, that no amount of proof of access will suffice to show copying if similarities are found to be absent. *Krofft*, 562 F.2d at 1172 (citing *Williams v. Kaag Manufacturers, Inc.*, 338 F.2d 949, 951 (9th Cir. 1964); *Arnstein*, 154 F.2d at 468).

permitted before crossing into the realm of substantial similarity. *See generally* 3 M. Nimmer, Nimmer on Copyright § 13.03[A][2] (1986). Here, the ear of the court must yield to the ears of jurors. *See Roy Export Co. Establishment v. CBS*, 503 F.Supp. 1137, 1145 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982), *cert. denied*, 459 U.S. 826 (1982). Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity. *See Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1978); *Universal Pictures v. Harold Lloyd*, 162 F.2d 354 (9th Cir. 1947); *Heim v. Universal Pictures Co.*, 154 F.2d 480, 488 (single brief phrase so idiosyncratic as to preclude coincidence might suffice to show copying) (*dictum*); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924) (L. Hand, J.) (eight note "ostinato" held to infringe copyright in song). *See also Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977) (words copied amounted to less than one percent of defendant's entire work; fair use), *cert. denied*, 434 U.S. 1013 (1977); *Robertson v. Batten, Barton, Durstine & Osborne, Inc.*, 146 F.Supp. 795, 798 (S.D. Cal. 1956) (portions of song used constituted element upon which popular appeal and hence commercial success depended; fair use). *See generally* Nimmer § 13.03[A][2] at 13-36, and citations therein (notion that copying of three bars from musical work can never constitute infringement is without foundation). Certainly, evidence that the sequence in question is found in other works would be admissible to rebut an inference of copying; such evidence demonstrates that the sequence is so common that the probability of independent, coincidental creation was high. *Granite Music*

Corp. v. United Artists Corp., 532 F.2d 718, 720 (9th Cir. 1976).

[9] But we do not understand Baxter's claim to center solely on one six-note sequence. The jury upon remand may, of course, determine that any similarity is confined to the sequence, and that the similarity is insubstantial.

CONCLUSION:

[10] Based upon our review of the record, we cannot say that **Joy** and **Theme from E.T.** are so dissimilar that reasonable minds could not differ as to a lack of substantial similarity between them. Therefore, the district court erred in granting defendants' motion for summary judgment.

Reversed and remanded for proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LESLIE T. BAXTER, an individual,	)	NO. CV 83-7081-
	)	HLH
)	
Plaintiff,	)	ORDER
	)	GRANTING
vs.	)	MOTION FOR
	)	SUMMARY
MCA, INC., ETC., et al.,	)	JUDGMENT
)	
Defendants.	)	(filed October
	)	23, 1984)
)	
_____	)	(entered October
	)	24, 1984)

Defendant's motion for summary judgment, previously submitted, is granted. The revised Statement of Uncontroverted Facts, Conclusions of Law, and Judgment is signed this date. The motion to strike the jury demand is off calendar as moot.

The second branch of the *Krofft* test (*Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.* (9th Cir. 1977) 562 F.2d 1157) is whether a reasonable lay jury could find "substantial similarity" of expression of the ideas—the so-called intrinsic test. This Court's "ear" is as lay as they come. The Court cannot hear any substantial similarity between defendant's expression of the idea and plaintiff's. Until Professor Bacal's tapes were listened to, the Court could not even tell what the complaint was about. Granted that Professor Bacal's comparison exposes a musical similarity in sequence of notes which would, perhaps, be obvious to experts, the similarity

of expression (or impression as a whole) is totally lacking and could not be submitted to a jury.

Plaintiff argues that the expert's declarations show substantial evidence of "striking similarity" and, therefore, the summary judgment cannot be granted. Plaintiff misses the point of the *Krofft* case (see, also, *Arnstein v. Porter* (2d Cir. 1946) 154 F.2d 464). "Striking similarity," according to the experts, may be evidence of access (admitted for purpose of this motion), but does not address itself to the "substantial similarity" of expression to the lay listener now being considered. As to that issue, the Court does not believe that there is a jury question.

The motion for summary judgment is granted.

DATED: October 23, 1984.

/s/ Harry L. Hupp
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESLIE T. BAXTER,	)	No. 84-6522
	)	D.C. # CV
Plaintiff-Appellant,	)	83-7081 HLH
)	
vs.)	
)	
MCA, Inc., a Delaware	)	ORDER
corporation; UNIVERSAL CITY	)	DENYING
STUDIOS, Inc., a Delaware	)	PETITION FOR
corporation; MUSIC CORPORATION	)	REHEARING AND
OF AMERICA, a California	)	SUGGESTION
corporation; MCA Records, Inc.,	)	FOR REHEARING
a California corporation;	)	EN BANC
MERCHANDISING CORPORATION)	
OF AMERICA, a California	)	(filed June
corporation; and JOHN T.	)	23, 1987)
WILLIAMS,)	
)	
Defendants-Appellees.)	
)	
)	

Before: TANG, BOOCHEVER and KOZINSKI, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. By the due date of May 22, 1987, no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

App. 29

No. 84-6522

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESLIE T. BAXTER,

Plaintiff-Appellant,

vs.

MCA, INC., et al.,

Defendants-Appellees.

PETITION FOR REHEARING
EN BANC

(Filed March 19, 1987)

RONALD S. ROSEN
MARSHA E. DURKO
SILVERBERG, ROSEN, LEON
& BEHR
A Partnership Including
Professional Corporations
2029 Century Park East
Suite 1900
Los Angeles, California 90067
Telephone: 213/277-4500

Attorneys for Defendant-
Appellee, John T. Williams

LOUIS P. PETRICH
EDWARD A. RUTTENBERG
LEOPOLD, PETRICH & SMITH
A Professional Corporation
2049 Century Park East
Suite 3110
Los Angeles, California 90067
Telephone: 213/277-3333

Attorneys for Defendants-
Appellees, MCA Inc., Universal
City Studios, Inc., Music Corp.
of America, MCA Records, Inc.,
Merchandising Corp. of
America

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Defendants-Appellees JOHN T. WILLIAMS, MCA INC., UNIVERSAL CITY STUDIOS, INC., MUSIC CORP. OF AMERICA, MCA RECORDS, INC., and MERCHANDISING CORP. OF AMERICA ("defendants") respectfully petition this Court for a rehearing of its March 5, 1987 Opinion ("Opinion"). Defendants suggest that a rehearing *en banc* is appropriate to secure or maintain uniformity of the Court's decisions and to resolve questions of exceptional importance (Fed. Rules App. Proc. 35(a)), as is more fully set forth herein.

I. INTRODUCTION

The grounds for rehearing are that: (1) material facts and law were overlooked or misapprehended in the Opinion; and (2) the Opinion is in apparent conflict with other decisions of this Court and the United States Supreme Court that were not addressed. F.R.A.P. 35(a), 40(a); Ninth Cir. Local R. 12(b).

After submission of the case for seventeen months,¹ in an Opinion by Circuit Judge Thomas Tang, joined in by Circuit Judges Robert Boochever and Alex Kozinski, the panel reversed a summary judgment that had dismissed a music copyright infringement claim against the theme music of the motion picture "E.T.: THE EXTRA-TERRESTRIAL" ("E.T. Theme") for lack of substantial similarity of protectible expression to plaintiff's song "Joy".

In the opinion of counsel a rehearing is appropriate and necessary because:

¹ Several important decisions were rendered during the interim. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986).

1. The Opinion resurrects the discredited anti-summary judgment "slightest doubt" rule (restated as a "no bright line" test) of *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946)—in conflict with decisions of the Supreme Court and this Court. The effect of the Opinion is to make summary judgment for lack of substantial similarity of expression unavailable in virtually all music infringement cases—and perhaps in all other infringement cases.

2. The Opinion purports to decide that a triable issue exists regarding *substantial similarity of expression*—but overlooks or misapprehends material facts and law as to (a) whether the arguable similarities relate to unprotected ideas or protectible expression, (b) whether a jury applying the "audience test" could reasonably conclude that the "E.T. Theme" serves to fulfill the demand for plaintiff's song, "Joy," and (c) what is the appropriate function of the courts in monitoring those issues.

3. The Opinion overlooks or misapprehends material law and conflicts with prior decisions of this Court and other Circuit Courts by applying the so-called Inverse Ratio Rule to the wrong issue.

4. The total effect of the Opinion is to abdicate an important judicial responsibility²—i.e., to administer the idea/expression dichotomy—in violation of copyright policy and First Amendment considerations and in conflict

² *Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 245 (2d Cir. 1983) (courts must monitor the limits within which juries may decide substantial similarity of expression).

with decisions of this Court and the United States Supreme Court.³

For the same reason, a hearing *en banc* is justified to secure or maintain uniformity of the Circuit's decisions and because the proceeding involves questions of exceptional importance. The Opinion also directly conflicts with existing opinions of other circuit courts and substantially affects rules of national application in which there is an overriding need for national uniformity. Local Rule 12(b).

The Opinion threatens to destroy an entire industry's ability to rid itself of the meritless plagiarism lawsuits attracted by virtually every successful television series, motion picture and musical composition.⁴ Unless meritless claims can be promptly dismissed, future creative effort and investment will be deterred. The lack of clear judicial guidelines will encourage strike suits,⁵ and, as a practical

³ The idea/expression dichotomy is mandated by First Amendment considerations. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) ("*Krofft*" hereafter).

⁴ E.g., *Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir. 1984) (affirming summary judgment dismissing claim by play against "E.T." movies) (many copyright cases are premised on a wholly erroneous understanding of copyright protection).

⁵ The draconian remedies of the Copyright Act—injunctive relief, impoundment and destruction, and damages measured by defendants' profits—17 U.S.C. §§ 502-504, attract suits and afford plaintiffs considerable leverage to coerce settlements. Defendants' motion picture, "E.T.", perhaps the most successful motion picture in history, has attracted at least four (4) unsuccessful infringement actions, dismissed on motion, notably *Litchfield v. Spielberg*, *supra* (affirming summary judgment for lack of substantial similarity). Its re-release is threatened by this suit.

matter, will unduly expand the monopoly claimed by plaintiffs and force overly cautious self-censorship by defendants. Such a result defeats the purpose of the Copyright Act and impairs First Amendment rights of self-expression.

Infringement is proven by showing (1) *substantial similarity of expression* in each work (2) that resulted from defendant's *copying* of plaintiff's work. The act of copying (*derivation*) is difficult to disprove by summary judgment because an inference of copying arises upon a showing of "access" and substantial similarity either of idea or expression. 3 Nimmer, *Nimmer On Copyright* § 13.03[E] at 13-58 to 59 (1986). Access is easily shown by prior publication and distribution by mass media. Thus, "lack of *substantial similarity of expression*" (involving the dual aspects of *protectibility* and *substantiality* of the taking) presents defendants' best hope to obtain prompt dismissal⁶ and to avoid infringement in the first instance.⁷ But this hope depends upon reasonably clear guidelines carefully applied by the courts.

In the case of dramatic works—books, motion pictures and television programs—this Court has developed guidelines so that the extrinsic and intrinsic tests of infringe-

⁶ Courts may determine non-infringement as a matter of law if the similarity concerns only non-copyrightable elements (e.g., facts or ideas) or if no reasonable jury could find the two works substantially the same. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986).

⁷ "... a defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar..." *Warner Bros., Inc. v. American Broadcasting Cos.*, 654 F.2d 204, 211 (2d Cir. 1981).

ment may be applied to dispose of meritless claims on motions for summary judgment. As a matter of law, no infringement exists under the intrinsic test unless a reasonable lay audience would consider defendants' work to serve as a substantial substitute for plaintiff's work. *E.g.*, *Berkic v. Crichton*, 761 F.2d 1289, 1294 (9th Cir. 1985).

On the substantive law, the Opinion fails to determine whether the arguable similarities involve protectible expression or musical ideas, fails to apply the audience test and misapplies the Inverse Ratio Rule (intended to determine *derivation*) to determine the *scope of protection*. Procedurally, in direct conflict with *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), and *See v. Durang*, 711 F.2d 141 (9th Cir. 1983) the panel mischaracterizes summary judgment as "disfavored", shifts the burden of proof to defendants to show the absence of evidence to support plaintiff's claim,⁸ and resurrects the discredited "slightest doubt" rule of the *Arnstein* decision, restated as a "no bright line" test.

⁸ In *Celotex*, clarifying its earlier decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the Supreme Court mandated that the non-moving party continues to bear the burden of raising genuine issues of fact regarding issues on which it has the burden of proof; the moving party has no duty to show the absence of evidence to support the non-moving party's case. 91 L.Ed. 2d at 265-66. The Opinion fails to cite *Celotex*, relies upon *Adickes* (Op. at 8) and implies (Op. at 11) that defendants failed to disprove the possibility of sufficient similarities of expression.

II. THE COURT FAILED TO DETERMINE WHETHER DEFENDANTS ARGUABLY TOOK PROTECTIBLE EXPRESSION OR WHETHER ANY TAKING WAS ARGUABLY SUBSTANTIAL UNDER THE AUDIENCE TEST

Defendants simplified the courts' task by *assuming for sake of argument* that:

1. Plaintiff owned the copyright in the song "Joy".
2. Defendants had access to plaintiff's song.

3. If any substantial similarity existed in the protectible expression in the two works, it resulted from copying by defendants (thus conceding *derivation*). All that remained for decision was whether defendants took *protectible expression* in *sufficient amounts* to constitute infringement (whether defendants' song satisfied the *demand* for plaintiff's song).

A. *Whether Expression Was Arguably Involved*

The Opinion never analyzes whether the arguable similarities⁹ involve *expression*. The panel misapprehends *defendants* to argue that a *six-note* sequence is at stake (Opinion at 10).¹⁰ It ignores *plaintiff's concession*¹¹ that

⁹ By "arguable similarities" we mean those similarities that are reasonably apparent from the works as distinguished from "claimed similarities" that are not supported by the record; the latter are irrelevant to the motion for summary judgment. *Celotex Corp.*, 106 S.Ct. 2548.

¹⁰ A musical note consists of a "pitch" [e.g., A, C, F] and a "duration" [e.g., quarter note, half note]. Plaintiff claimed that the 12-note "motif" in "Joy" was infringed by the 8-note main theme in "E.T." The pitches and rhythm of these two segments may be illustrated as follows, with the

(Continued on following page)

two segments of six notes identical only in pitch (without considering rhythm, context, and other qualities) is meaningless.¹² "Similarity of tone succession" is "inevitable in all musical compositions." *Hirsch v. Paramount Pictures*, 17 F.Supp. 816, 817 (S.D. Calif. 1937) (Yankwich, J.)

If the panel had considered defendants' contentions (note 10, *supra*) that only four successive notes in each

(Continued from previous page)

pitch of each note represented by each letter and its *duration* by the number of times the pitch is denoted between dashes. (Lower case letters represent grace notes.)

"JOY": DD-DD-DD-GG-f-g-F-E-D-E-CC-AA.

"E.T. Theme": CCCC-GGGG-F-E-D-E-CCCC-GGGG.

Defendants argued that, at most, a four-note sequence was properly compared—only a four-note sequence was identical in pitch and rhythm: F-E-D-E (underlined above) (Defts' Jt. Br. 3). Other popular songs with the same four-note sequence are: "The Star Spangled Banner," "O Holy Night," "Three Blind Mice," "God Save the Queen."

¹¹ C.R. 14, Exh. F, at 46-55. Plaintiff happily conceded that many earlier songs had musical phrases with the same 6-note sequence equal in pitch; he ridiculed its significance, pointing out that the first seven notes of "Rock Of Ages" and "Rudolph the Rednosed Reindeer" are also identical in pitch to each other. *Ibid*; Baxter Reply Br. 3-4.

¹² All music in Western society is limited to 12 pitches, reduced to 7-note major or minor scales, and reduced further still by the limited number of combinations that are pleasing to the ear. *Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 82 (2d Cir. 1940). The panel's ruling that fragments of musical ideas or cliches no matter how differently used or developed may be copyrightable directly conflicts with decisions holding in literary and factual contexts that the use of ideas, cliches, scenes-a-faire and other staples of literature cannot raise a triable issue of fact. See, e.g., *Berkic v. Crichton*, 761 F.2d 1289, 1293-94 (9th Cir. 1985).

work were identical in pitch *and rhythm*, it would have had to deal with an existing precedent directly on point:

“The *copyrightability* of [the song] ‘Bubbles’ is *not* the *four note sequence* but the fitting together of this sequence with other melodious phrases into a unique composition.”

Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 721 (9th Cir. 1976) (Carter, J.) (emphasis added).

The panel seems to rule that whether expression is involved (Op. 10, ¶2) depends upon the amount of the taking (Op. 10, ¶3). All authority is to the contrary. *E.g., Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir. 1984) (reversal for lack of substantial similarity of *expression* after judgment of copying); *Walker*, 784 F.2d at 49-51. The panel’s approach converts the issue of *copyrightability* into a question of *derivation*.¹³

As a backstop, the panel concludes “but we do not understand Baxter’s claim to center solely on one six-note

¹³ Both *Berkic* and *Litchfield* rejected the claim that proof of derivation without a showing that substantial amount of protectible expression proves infringement. Significantly, the cases cited as authority for the panel’s analysis of *expression* (Op. at 10-11) do not analyze whether the allegedly copied sequence constituted protectible expression, but with one exception either focus on whether the similarities indicated *derivation* (*Heim*, *Fred Fisher*) or whether the taking of conceded by protectible expression was excused by the “fair use” defense (*Walt Disney*, *Meeropol*, *Robertson*). *Harold Lloyd* ruled that copying of 57 consecutive scenes from a film constitutes infringement. The panel’s reliance on Professor Nimmer’s suggestion that copying of *three successive bars* of music *might* constitute infringement indicates a misapprehension of the facts of this case. The four note segment here is *one-half* ($1/2$) of one bar.

sequence.”¹⁴ Opinion at 11. But that cryptic comment is never explained.¹⁵ Nor, when one listens to the works (audiotapes, Appendix 2) with the correct test in mind, does comparison of the works as a whole advance plaintiff’s claim.

B. *Whether Substantial Similarity of Expression Arguably Existed Under The Audience Test.*

If similarities of expression arguably existed, it remained for the panel to determine whether a lay audience would have recognized the E.T. Theme to be a version of Joy (*Berkic*, 761 F.2d at 1294; *Krofft*, 562 F.2d at 1165),¹⁶ that is, whether a lay audience would reasonably have concluded that E.T. would satisfy the demand for Joy. *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986) (a “fair use” decision rendered while this case was under submission).

¹⁴ Actually, Baxter’s claim that the 8-note “E.T. Theme” was copied from the second of three themes in “Joy”, Baxter Op. Br. 15, see note 10, *supra*, was the only articulated basis for this suit. The real gist of his argument was that the Court should modify *Krofft* to allow expert testimony to replace the audience test and that defendants’ assumption of access *arguendo* lowered the standard of copyrightability. Baxter Op. Br. 23-34, Reply Br. 14-25. But see note 18, *infra*.

¹⁵ Of course, Baxter’s “claim” is irrelevant unless it is supported by the record. *Celotex Corp.*, 91 L.Ed. 2d at 275. If this comment means that defendants’ summary judgment must be reversed because defendants have failed to negate arguable infringement of *other* aspects of plaintiff’s song, the panel’s comment directly contradicts the rule in *Celotex* that the moving party does not bear the burden of disproving a case that the plaintiff has not made.

¹⁶ This is the so-called “audience test”, which is an integral part of the intrinsic test at issue here. *Krofft*, 562 F.2d at 1165.

Although making reference to the lay audience test (Op. at 7 n.2) the panel does not seem to apply it. Instead it analyzes the case:

1. by relying upon defendant's concession of access¹⁷ to lower the quantum of proof required to find substantial similarity of expression (Op. at 10).¹⁸

¹⁷ Although defendants deny access and copying, they conceded access *arguendo* for sake of the motion, and thus did not respond to plaintiff's claims of access—which the Court recites and relies upon at length (Op. at 4, 10). Defendants objected to any consideration of plaintiff's expert's testimony or special tapes; the panel seems to have acknowledged that such evidence was improper to the issues here. Op. at 7 n.2.

¹⁸ This serious error could have grave consequences as law of the case if not corrected on rehearing. Because access and similarities may raise an inference that one work is *derived* from another the panel reasons that access bears on the question whether *expression* is involved and whether that which was derived was substantial. The panel is apparently misled by the fact that "substantial similarity" in two different senses is a part of two different inquiries about *derivation* and *infringement*. "Substantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement." *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3rd Cir. 1975). The panel's use of the Inverse Ratio Rule was expressly rejected in the Second Circuit. *Arc Music Corp. v. Lee*, 296 F.2d 186, 187-88 (1961). The *Krofft* decision cited by the panel does not support its conclusion. In *Krofft*, the so-called Inverse Ratio Rule was applied *after* substantial similarity of expression was determined without reliance upon access or the Rule; access was later said to raise an inference that the similarities derived from *copying*. 562 F.2d at 1172. Confusingly, the panel's footnote 3 shifts ground again by stating the "no amount of access will suffice to show *copying* if similarities are found to be absent." "*Copying*" is not the issue in this case; it was conceded for purpose of the motion. The issue is whether what was taken was "expression" and whether it was sufficiently

(Continued on following page)

2. by applying the wrong test for summary judgment (Part III *infra*);

3. by creating a new burden on defendants to prove that an "absence of similarities" is "patent". (Op. at 9);¹⁹

4. by suggesting that "no bright line rule exists as to what quantum of similarity" constitutes infringement, because relatively small takings may be substantial if qualitatively important (Op. at 10);²⁰

No "bright lines" existed in the *Jason*, *Berkic*, *Litchfield* or *See* decisions either, but that did not prevent this Court from affirming summary judgments, while acknowledging the existence of some similarities.

(Continued from previous page)

"substantial" arguably to constitute infringement. No amount of access helps answer this question. This Court has affirmed summary judgment for lack of substantial similarity of expression, even where access and some similarities were assumed or proved in *Berkic*, *Litchfield*, *See* and *Jason* (alternative holding). Moreover, a new rule that would raise an inference of unlawful copying from "access" would contradict copyright policy that encourages subsequent authors to use the unprotectible ideas in prior works, and would raise First Amendment issues. *Lansberg*, 736 F.2d at 488.

¹⁹ As authority for this proposition (Op. at 9), the Opinion paraphrases and cites *Arnstein*, which concluded that summary judgment might be possible only if the contesting works were "Bolero" and "When Irish Eyes Are Smiling".

²⁰ This calculus is circular unless meaning is given to qualitative importance. The audience test as applied in *Berkic* and *Litchfield* provides that direction; the question is whether an audience would reasonably recognize one work to be a version of the other. See also, *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986) (fair use depends on whether one work serves the demand for the other).

III. THE OPINION FAILS TO FOLLOW THE PROPER TESTS FOR SUMMARY JUDGMENT ESTABLISHED BY THE SUPREME COURT, OTHER PANELS OF THIS CIRCUIT AND OTHER CIRCUIT COURTS

The rules for summary judgment have been changing for the past several years, in copyright and other cases. For many years, an anti-summary judgment bias existed, exemplified by the copyright infringement decision in *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946), which held that summary judgment was disfavored and unavailable where the "slightest doubt" as to a factual dispute existed. As a result, no decision of this Court affirmed a summary judgment for lack of substantial similarity of expression until *Jason v. Fonda*, 698 F.2d 966 (9th Cir. 1982). However, since the 1963 amendment to Federal Rule of Civil Procedure 56(e), *Arnstein* and its progeny are "mere mementos of law gone by" on the procedural standard. 6 Pt.2 *Moore's Federal Practice* ¶56.17[14] at 56-798 (2d ed. 1985)²¹

In *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983), Judge Tang's original slip opinion reversed a summary judgment based on lack of substantial similarity, citing *Arnstein* and its progeny, *Goodson-Todman* and *Morrissey*, and making an *Arnstein*-like statement that summary judgment in copyright infringement cases is disfavored. After defendants' petition for rehearing in *Twentieth* pointed out that the panel

²¹ This Court noted *Arnstein's* demise as a standard for summary judgment in *Krofft*, 562 F.2d at 1165 (1977) and again in *See v. Durang*, 711 F.2d 141, 143 (1983).

was relying on the discredited *Arnstein* rule, the panel simply struck the references to the *Arnstein*, *Goodson-Todman* and *Morrissey* decisions, inserting instead a reference to the *Krofft* opinion²², but leaving intact the anti-summary judgment language of *Arnstein* and its progeny.

While the petition for rehearing in *Twentieth* was pending, another panel, in *See v. Durang*, 711 F.2d 141, 142 (9th Cir. 1983), noted *Arnstein's* demise and held:

no special standard is applied in determining whether summary judgment is appropriate on the issue of substantial similarity of expression in a copyright case.

Later decisions of this Court had to distinguish those aspects of *Twentieth* hostile to summary judgments: in *Litchfield* (1984), 736 F.2d at 1356, the Court disapproved the use of lists of similarities (used in *Twentieth*) to create a triable issue of fact of substantial similarity of expression; in *Berkic* (1985), 761 F.2d at 1292, the Court had to explain the earlier statement (in *Litchfield*, copied from *Twentieth*), that summary judgment is "disfavored" in copyright infringement suits because substantial similarity involves a "close issue of fact."

The Opinion reinstates *Arnstein* in holding that "since substantial similarity is usually an extremely close issue of fact, summary judgment is *disfavored* on that issue as a general rule." Op. at 9 (emphasis added).

While this case was under submission the Supreme Court rendered a significant decision regarding summary judgment in *Celotex*, 106 S.Ct. 2548 (1986). Clarifying

²² See Appendix 1; *Krofft* did not involve summary judgment.

the 1963 amendment to Rule 56 and later decisions, the Court concluded:

1. summary judgment is not a disfavored procedure;
2. the moving party need not show the absence of a genuine issue of material fact with respect to an issue on which the non-moving party bears the burden of proof; and

3. where the non-moving party fails to sustain his burden of proof, summary judgment is mandated. 91 L.Ed. 2d at 265-66.

The panel's Opinion reinstates *Arnstein's* "slightest doubt" rule in direct conflict with *Celotex* and *See v. Durang*:

1. It regards a summary judgment as "disfavored." (Op. at 9)²³

2. It implies that defendants had and failed to carry a burden of disproving that similarities other than a 4- or 6-note segment were arguably infringing. (Op. at 11).

3. It shifts to defendants the burden of proving that "the absence of similarities is so patent as to warrant summary judgment. See *Arnstein*, 154 F.2d at 473." (Op. at 9) See note 8, *supra*.

²³ It justifies this conclusion by reasoning that the similarity issue is "usually an extremely close issue of fact". Opinion at 9 (emphasis added). But, because the idea/expression dichotomy involves policy issues, *Krofft*, 562 F.2d at 1163, a mixed issue of fact and law exists. See *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) ("fair use" a mixed issue). Moreover, since no dispute exists in the record about the contents of the works, none of the other anti-summary judgment admonitions about "credibility", "weighing evidence" or drawing inferences is relevant here.

4. It requires defendants to show that a "bright line exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity." (Op. at 10). *Contra: Jason, Berkic, Litchfield and See.*

5. It requires defendants to show that the two works "are so dissimilar that reasonable minds could not differ as to a lack of substantial similarity between them." (Op. at 11).

IV. CONCLUSION

This is a simple but an important case. A review of the two works (less than five total minutes on cassette tapes in Appendix 2) can lead to only one conclusion: The similarity of 4- or 6-notes, as used in this case, occurs at the level of idea, not expression. Alternatively, no lay audience could reasonably believe that the E.T. Theme satisfies the demand of the consuming public for plaintiff's "Joy." Plaintiff thus has not shown an arguably substantial taking of protectible expression and summary judgment is mandated.

For all the foregoing reasons, a rehearing, *en banc* if necessary, should be granted.

DATED: March 18, 1978

/s/ Ronald S. Rosen
RONALD S. ROSEN of
SILVERBERG, ROSEN,
LEON & BEHR

Attorneys for the
Defendant-Appellee,
JOHN T. WILLIAMS

/s/ Louis P. Petrich
LOUIS P. PETRICH of
LEOPOLD, PETRICH &
SMITH

Attorneys for Defendants-
Appellees, MCA INC.,
UNIVERSAL CITY STU-
DIOS, INC., MUSIC CORP.
OF AMERICA, MCA REC-
ORDS, INC., MERCHANDIS-
ING CORP. OF AMERICA

CONSTITUTIONAL PROVISIONS,
STATUTES, AND RULES INVOLVED

Article I, section 8 of the Constitution provides that:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The First Amendment to the Constitution provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 102(a) of the Copyright Act of 1976, 17 U.S.C. § 102(b), provides:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . Works of authorship include the following categories:

. . .

(2) musical works, including any accompanying words;

Section 102(b) of the Copyright Act of 1976, 17 U.S.C. § 102(b), provides:

In no case does copyright protection for an original work of authorship extend to any idea. . . [or] concept. . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Federal Rule of Civil Procedure No. 56

Rule 56. Summary Judgment.

(a) **FOR CLAIMANT.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **FOR DEFENDING PARTY.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **MOTION AND PROCEEDINGS THEREON.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **CASE NOT FULLY ADJUDICATED ON MOTION.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining

the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **WHEN AFFIDAVITS ARE UNAVAILABLE.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts

essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **AFFIDAVITS MADE IN BAD FAITH.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TWENTIETH CENTURY-FOX	)	No. CA 80-5868
FILM CORPORATION, ET AL.,)	
	)	D.C. No.
Plaintiffs-Appellants,	)	CV-78-2437
)	
vs.	)	ORDER
	)	AMENDING
MCA, INC., et al.,	)	OPINION
)	
Defendants-Appellees.	)	(Filed May 6, 1983)

Before: CHAMBERS, GOODWIN and TANG, Circuit
Judges.

The opinion filed January 11, 1983, is amended as follows: (1) Page 195 of Slip Op.—In the 2nd column, following the 1st sentence of the 1st paragraph (ending with “. . . idea was copied.”), insert the following citation:

Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).

(2) Page 195 of Slip Op.—Following the sentence: “At a minimum, it is a close enough question that it should be resolved by way of a trial.”—delete the signal “See” and the three citations (*Goodson-Todman*, *Morrissey*, and *Arnstein*).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 87-1064 HLH

Date June 22, 1987

Title INTERACTION RESEARCH, INC. V. AIR CAL,
INC.

DOCKET ENTRY

PRESENT:

HON. Harry L. Hupp, JUDGE

Robert Bolton

Deputy Clerk

Stella Cordova

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Philip A. Putman

ATTORNEYS PRESENT FOR DEFENDANTS:

David Nimmer

Richard A. Sherman

PROCEEDINGS: Motion to Dismiss, or in the Alternative, Summary Judgment

ORDER (also, if applicable, findings and memorandum opinion):

Defendant's motion to dismiss or, in the alternative, for summary judgment is denied. Defendant has 20 days to answer.

At least parts of plaintiff's product could reasonably be said to be so close to comparable parts of defendant's product that the court cannot say that a reasonable jury could not find substantial similarity of expression. The court has in mind that a limited number of ideas must be expressed and that there must be a limited number of ways of expressing the ideas. In addition, there are a substantial number of differences in the expression of the ideas so that a jury could clearly and unequivocally find, if they chose to do so, no substantial similarity. The question, though,

is whether the jury could find the requisite substantial similarity in at least parts of the expressions. By a recent reversal (*Baxter v. MCA, Inc.* (9th Cir. 1987) — F.2d — (#84-6522, 3/5/87)), the court's attention has been forcefully drawn to the necessity of letting the jury decide the question if it is remotely arguable. (Contra, apparently, *Frybarger v. IBM* (9th Cir. 1987) — F.2d — (3/10/87, #86-2004)).

Plaintiff please pay attention to your exhibits next time; items different than the ones described were attached and items listed were not attached at all.

Initials of Deputy Clerk RB

NOT FOR PUBLICATION
UNITED STATES COURTS OF APPEALS
FOR THE NINTH CIRCUIT

GENE THOMPSON,)	
	)	Nos. 86-6185
Plaintiff-Appellant,	)	86-6505
)	
v.	)	DC. No.
	)	CV 85-1583 JMI (Kx)
LIONEL RICHIE, et al.,)	
	)	MEMORANDUM*
Defendants-Appellees.)	
<hr/>		

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding
Argued and Submitted: April 6, 1987
Pasadena, California

June 11, 1987

Before: ANDERSON, SKOPIL, and REINHARDT,
Circuit Judges.

Gene Thompson composed the music and lyrics to a song he entitled "Somebody's Got to Love Her." Thompson's song was copyrighted in 1980, with a certificate of registration, in the form of lyrics and a sound recording, but not as sheet music.

Lional Richie composed the songs "Stuck on You" and "Hello" in 1983. They became widely distributed and

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

very successful as songs on Richie's phonograph record "Can't Slow Down."

In 1985, Thompson brought a copyright infringement action against Richie, alleging "Stuck on You" and "Hello" infringed his copyright to "Somebody's Got to Love Her." Richie moved for summary judgment on the ground there was no substantial similarity between the works. For purposes of Richie's summary judgment motion, he conceded access to Thompson's work. Thompson opposed the motion and withdrew his claim that the song "Hello" infringed his song. He also submitted the declaration of Dr. Robert Winter, a music expert, who examined and compared "Stuck on You" with "Somebody's Got to Love Her" and found similarities in the melody, harmony and rhythm between the two songs.

The district court reviewed the audio cassettes and lyric sheets of "Stuck on You" and "Somebody's Got to Love Her" and found the works were not of substantial similarity of expression or ideas. The court concluded that the ordinary, average lay person could not find the works substantially similar as a matter of law. Accordingly, the district court granted Richie's motion for summary judgment and for costs and attorney's fees of \$34,307.65.

Thompson appeals the grant of summary judgment and the fees award. As to each, we reverse.

We review *de novo* a summary judgment ruling that there is no substantial similarity between two works in a copyright suit. *Frybarger v. IBM*, 812 F.2d 525, 528 (9th Cir. 1987). Since the plaintiff in a copyright suit bears the burden of showing that the works are substantially similar, Thompson must show some genuine issue of material

fact exists as to whether a reasonable jury could conclude the works are substantially similar if he is to avoid affirmance of summary judgment. *Id.* at 529. We believe he has done so.

To establish a claim for copyright infringement, Thompson has to show: (1) he owns the copyright of the work, and (2) "copying" of protectible expression by Richie. *See Baxter v. MCA*, 812 F.2d 421, 423 (9th Cir. 1987), *as amended*, slip op. (9th Cir. May 11, 1987). Since direct evidence of copying is rarely available, Thompson can establish copying by circumstantial evidence of: (1) access to the song prior to creation of Richie's song, and (2) substantial similarity of general ideas and expression between the two works. *Baxter*, 812 F.2d at 423; *Frybarger*, 812 F.2d at 529.

Thompson's ownership of the copyright to "Somebody's Got to Love Her" is undisputed. Also, for purposes of summary judgment, Richie conceded access to Thompson's work. Therefore, the only question is whether the district court's finding that the works were not substantially similar can sustain the grant of summary judgment.

Under substantial similarity we must determine whether the works are substantially similar (1) in their general ideas (extrinsic test), and (2) in their general expression (intrinsic test). *Berkie v. Crichton*, 761 F.2d 1289, 1292 (9th Cir.), *cert. denied*, 106 S.Ct. 85 (1985). The extrinsic test relies on expert testimony. The intrinsic test, however, "is subjective; it depends solely 'on the response of the ordinary reasonable person.'" *Id.* (quoting *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977)). "[E]xpert

testimony . . . is inappropriate in applying the intrinsic test." *Id.* Since substantial similarity is usually an extremely close question of fact, summary judgment is disfavored. *Frybarger*, 812 F.2d at 528.

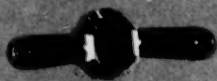
We find an issue of fact with respect to similarity of ideas. Through the use of expert opinion, Thompson attempted to show that of the twenty different pitches in the opening phrases of the two songs, nineteen were nearly identical. Such similarity was also opined in the harmony and the tempo.

Playing the tapes of both songs reveals that there is also an issue of fact as to similarity of expression.

Since there is "no bright line . . . as to what quantum of similarity is permitted before crossing into the realm of substantial similarity," *Baxter*, 812 F.2d at 425, we feel the ears of the court must yield to the ears of the jurors. While the two songs appear to have little similarity, we cannot say they are so dissimilar as to justify summary judgment. *See Frybarger*, 812 F.2d at 528 (since substantial similarity is usually an extremely close question of fact, summary judgment is disfavored).

The district court's grant of summary judgment is reversed. In light of our finding of reversal, it follows that the district court erred in finding Thompson's suit frivolous. Therefore, the award of costs and attorney's fees is also reversed.

REVERSED and REMANDED.



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6X9